

FEDERALISM AND THE NO CHILD LEFT BEHIND ACT:  
AN ANALYSIS USING CONSTITUTIONAL, SYSTEMS, AND ADAPTIVE WORK  
FRAMEWORKS

by

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## Abstract

A four-frame analysis of NCLB was conducted. The first frame involved constitutional federalism as defined by the Guarantee Clause of the Constitution, the Tenth Amendment and its intersection with the Spending Clause, the Fourteenth Amendment, and the Eleventh Amendment. The historical context of each constitutional component was examined and presented in the belief that text without context fails to provide full understanding. 135 court cases, primarily Supreme Court cases, were examined using legal analysis procedures. Peter Senge's systems thinking formed the second frame, while the third frame centered on Ronald Heifetz's concept of the adaptive work required to close the gap between the vision (no child left behind) and the reality (achievement gaps). The fourth frame, federalism as a public policy approach, emerged from writings by Alexander Hamilton, James Madison, Justice Felix Frankfurter, and Akhil Reed Amar as well as opinions by Justices Brandeis and O'Connor. Federalism as a public policy views the federal and state governments as equal partners wherein states serve as laboratories engaged in experimentation to find solutions to complex problems. Comparative analysis and rational argument were used for the last three analytical frames. Historical research and analytical study broke new ground regarding: the thread of America's answer to Aristotle's question regarding a government based on the rule of law or of individuals; Madison's activities as reflecting both possible answers to Aristotle's question; the intertwining of treaty rights, the status of tribal governments, and citizenship rights for tribal citizens; and the substitution of argumentative tricks for sound analysis in recent Tenth and Eleventh Amendment jurisprudence. The following findings were reached: 1) NCLB possibly violates one or more of the conditional spending tests articulated in *Dole v. South Dakota*; 2) NCLB does not take a systems approach to the system of children's well-being in America; 3) NCLB treats a symptom (achievement gaps) and ignores the primary cause of those achievement gaps (poverty); 4) by treating a symptom as a cause, NCLB ignores the adaptive work needed to close the gap between NCLB's vision and the reality of achievement gaps primarily caused by inequitable distribution of incomes and poverty in America; 5) poverty exerts a primary force upon education that is negative, that acts as a fundamental factor impacting the system of children's well-being, and that inhibits a child's ability to fully benefit from education; 6) NCLB does not utilize a public policy approach based upon federalism; and 7) until the system of children's well-being is addressed, achievement gaps will persist. It is recommended that the *amicus curiae* brief submitted by the National Council of State Legislatures in *Dole* be used as a model for a constitutional challenge to NCLB. Since NCLB is an exercise in congressional conditional spending, it needs to be challenged on those grounds. Finally, constitutional challenges to NCLB will not matter in the absence of a systemic approach designed to confront the negative influences of poverty on the system of children's well-being in America.

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## Chapter 1

### Introduction

#### Statement of Purpose

I propose to examine the constitutional issues relating to federalism raised by the latest federal reauthorization of the Elementary and Secondary Education Act (ESEA), popularly known by title as the No Child Left Behind Act or by acronym as NCLB. In examining the provisional impact of federal legislation upon a state's educational system according to the principles of federalism, I will consider the Guarantee Clause, the Tenth Amendment, the Eleventh Amendment, and the Fourteenth Amendment of the United States Constitution as viewed through the lens of the eighteenth century constitutional debates, the historical record of each of the Amendment's development and adoption, textual analysis of the constitutional components, and subsequent case law.

The importance of a constitutionally viable system of federalism for achieving the goal of NCLB cannot be overstated. This *a priori* proposition forms the context for both federalism's importance and the justification for analyzing NCLB according to the constitutional provisions governing federalism. Federalism provides a policy approach that forges a federal-state partnership to solve America's problems. The goal, seeing that no child in America gets left behind, is a noble one. It also appears to be a complex goal as well. A child's ability to benefit from instructional programs depends greatly upon her or his well-being. The well-being of children in America results from the impact of multiple systems, only one of which is education. Efforts to see that no children get left behind must therefore be cognizant of a systems view that frames the issue in terms of children's well-being. The path towards achieving that goal, moreover, does not appear to be clear either. Therefore we have a complex problem that we're

not sure how to solve. By definition, according to Ron Heifetz, this is a task requiring adaptive work (Heifetz, 1994, pp. 74-75). Heifetz defined adaptive work as the “learning required ... to diminish the gap between the values people stand for and the reality they face” (Heifetz, 1994, p. 22). According to Heifetz, attention must be focused “on the specific issues created by the gap (between aspirations and reality)” (Heifetz, 1994, p. 99).

From a constitutional standpoint federalism represents a uniquely American political concept which: 1) regards sovereignty as residing in the people (as opposed to a government or individual ruler); and 2) is designed to counter tyranny through a system of split government that would encourage citizen involvement at the local level and provide for a viable national government. From a public policy standpoint federalism could link systems thinking and adaptive work together in a powerful combination. Only by yoking federalism, systems thinking, and adaptive work can the goal of NCLB be achieved, that of ensuring that no children be left behind in American society.

To illustrate the constitutional importance of federalism, information will be presented that explains federalism as a political concept that was developed by the constitutional Framers, a concept that was directly embedded in the Constitution, and a political concept that was subsequently illuminated by Supreme Court rulings. Each of the constitutional components of federalism will be presented and discussed. These constitutional elements include the Guarantee Clause, the Tenth Amendment (including Twentieth Century developments regarding its intersection with the Spending Clause), the Eleventh Amendment, and the Fourteenth Amendment. Additionally, a preliminary sketch will be presented discussing the intersection of federalism and NCLB.

To illustrate the procedural importance of federalism for public policy, information about the contents of NCLB will be presented which will be followed by three analyses of NCLB. The first analysis, based upon qualitative work, will present informed views of NCLB from the leaders of two Midwestern state departments of education (Doug Christensen, Nebraska Commissioner of Education, and Ted Stilwill, Director of the Iowa Department of Education) charged with implementing the federal law in their state's public schools. Their views will serve to highlight subsequent analyses based on the three frameworks of this dissertation's title. The next two analyses will offer the first two of three framework analyses of NCLB – Senge's model for systems thinking and Heifetz' concept of adaptive work. Federalism will serve as the common thread linking those analyses with the analysis based upon the framework of constitutional federalism, which, in turn, will highlight the critically important role that federalism plays.

The constitutional and public policy threads of federalism interweave to form a uniquely American tapestry of government serving as a blueprint for addressing America's problems and for securing the general welfare of American society. To help highlight the interdependence of these two threads, the constitutional importance of federalism will be located between the public policy analysis of NCLB by two state educational leaders and the public policy analyses formed by the frameworks of systems thinking and adaptive work. Having established the importance and uniqueness of federalism as being deeply embedded in the Constitution for public policy purposes, the constitutional analysis of NCLB in terms of federalism will then occupy center stage for the remainder of this study.

## **Statement of the Problem**

### **Federalism.**

Federalism occupies center stage in the American constitutional scheme for representative government. Federalism focuses on the distribution of powers between the federal government and the multiple state governments. Possessing a keen historical perspective, the constitutional framers were well aware of numerous instances in ancient and modern Europe whereby a love of and desire for greater power had perverted previous democracies and republics into oligarchies and tyrannies. As John Dickinson reminded his fellow delegates to the Constitutional Convention, “Experience must be our guide. Reason may mislead us” (Farrand, II, p. 278; afterwards all citations of Farrand’s *Records of the Federal Convention of 1787* will be cited as Farrand, volume number in roman numerals, and p. followed by the page number). The founders sought to counter what they perceived as a historical trend by separating national power into three branches of government with each branch possessing a unique set of checks and balances on the other two branches. The framers further divided power between the national government and the various state governments. Finally, they established additional protections for federalism in the Constitution by enumerating the powers of the national government and by including two clauses, the Necessary and Proper Clause and the Guarantee Clause.

Following the adoption of the constitution, amendments pertaining to federalism were added to the Constitution. These subsequent additions to the Constitution included the Tenth, Eleventh, and Fourteenth Amendments. Just as each of the three branches of government had its own unique powers to check the other two branches from accumulating too much power, so federalism was designed by the constitutional framers to prevent tyrannical concentrations of power at either the federal or state levels of American government. In twenty-first century America the balance of power between state and federal governments is regulated by the Constitution and by the constitutional case law developed by the judicial branch’s interpretations

of federalism since the adoption of the Constitution. The issue of federalism lies at the heart of the recent federal education bill, particularly as it relates to Iowa's experience in providing a free and public education for its young people.

### **Iowa's educational system.**

Iowa, like each of its 49 sister states, created its system of public education under specific authorization of its state constitution (McCoy, pp. 1-11). Iowa grounded the operation of its state educational system in the concept of "local control." Under both this concept and constitutional authorization, legislators created the Iowa Department of Education "to act in a policymaking and advisory capacity and to exercise general supervision over the state system of education" (Chapter 256.1, Code of Iowa). Rules and regulations subsequent to constitutional and legislative authorization created a system of education whereby local boards of education in each school district were formed with board members being democratically elected by the citizens of each district. These boards were directed to provide governance for their local schools. By these actions the state created a broad educational framework and general expectations for public education in the state and made each local school district responsible for filling in the details of how students would be educated in their district.

Iowa thus chose to enact its vision of education based upon the belief that the best educational decisions for each learner are those decisions made in closest proximity to the learner.<sup>1</sup> Iowa stood alone in resisting the nationwide call for state standards for student achievement. When this study began in 2003, Iowa was the only state that did not have state student achievement standards (see Appendix A). Instead the responsibility for developing standards for student achievement had been shouldered by each of the 367 school districts in Iowa (Chapter, 280.12, Code of Iowa). Neither did Iowa at that time, nor does it currently,



require its students to pass a statewide test in order to graduate (see Appendices B & C). As with student learning standards, graduation requirements were locally determined by each of the 367 democratically elected boards (Chapter 280.14, Code of Iowa). However, effective with the graduation classes of 2010, all states were mandated to have completed a core curriculum in order to graduation. The core curriculum was defined by the state as four years of English and three years each of social studies, math, and science. The nature and make-up of those courses, however, is still a matter of local determination.

Perhaps because the state is grounded in agriculture, citizens instinctively know that a system predicated on testing, sanctions, and fear do not create either gardens or fields of opportunity where learning flourishes. One vocational agriculture instructor characterized such efforts as futile and observed, “You don’t fatten cattle for market by weighing them” (Albertson, p. 1). More recently the literal meaning of this metaphor was stated directly by David Larson, Executive Director of the Connecticut Association of Public School Superintendents. Commenting upon the testing requirements of the ESEA Reauthorization Bill, Mr. Larson observed, “You don’t make a kid smarter by testing him more” (Lightman, p. A1).

Neither do they believe in a one-size-fits-all educational approach achieved through legislative or executive fiat. For the most part, Iowa has chosen to enact policy and to leave the working out of the details to achieve that policy to each of the 372 school boards and their district’s parents and educators.

Recent action by the State of Iowa reflects a continuing belief in local control, that the state’s role is to be that of policy maker with local school districts being given the task of deciding how that policy is to be implemented in individual districts (Chapter 280.14, Code of Iowa). The state adopted Iowa Teaching Standards as a guidepost for teaching excellence

(Chapter 284.3, Code of Iowa). Each standard, while directed to specific instructional expectations, is general enough to allow districts to develop specific descriptors of district expectations for instructional excellence. At the same time, Iowa also adopted state Professional Development Standards, again building upon local control with the state as policy maker and individual districts as decision-makers as to the what and how of policy implementation (Chapter 83.6 (2)(b), Iowa Administrative Code). Each district is given responsibility for determining both the content of professional development and its alignment (how the selected professional development will be aligned with district student achievement standards and the Iowa Teaching Standards). Ironically, Iowa's educational policy (no state standards for student achievement, but state standards for teaching and for professional development) remains the only policy (state or national) that rests on a solid research base for promoting student learning.<sup>2</sup>

The concept of local control, particularly as it relates to educational issues as enacted in Iowa, rests upon some bedrock beliefs and assumptions.<sup>3</sup> First is a belief in representative democracy – people can choose good legislators who will enact policies that promote the public good. Second is a belief in grassroots democracy – people need to be involved in determining how specific policies will be enacted in their neighborhoods and communities. Third is an educational belief – that the best educational decisions are those made in closest proximity to the learner. Such an educational belief: 1) implements local control; 2) acknowledges the importance of educators to student learning; and 3) deductively implements a research-based practice regarding formative evaluation and student learning (Black & Wiliam, pp. 139-148)<sup>4</sup>.

### **Problematic components of nclb.**

The prescriptive approach of the No Child Left Behind Act runs counter to Iowa's educational practice of local control. Rather than reflecting policy and leaving the

implementation details to the local level, NCLB is highly prescriptive in detailing what each state will do. Such prescriptive requirements include:

- requiring every (not just Title I students) public school student in grades three through eight and at least one high school grade level to take tests every year in reading, math, and science.
- requiring every state to hold each of their public schools accountable for student proficiency on the exams required of all students in grades three through eight and in at least one high school grade level.
- requiring every state to administer the National Assessment of Educational Progress to a sample of students.
- requiring the states to oversee a federal system of escalating sanctions to schools not deemed to be performing well by federal standards.
- requiring states to abandon their own system of attendance requirements in favor of the federal law which will create choice for students in schools not deemed to be performing well by the federal government.

The prescriptive approach of NCLB also appears to go beyond current understandings of the federal government's role regarding both educational policy and educational practice. It also represents a change in students targeted for help by federal aid. Whereas in the past, ESEA legislation focused on just the students targeted for educational assistance with federal funds, this ESEA action focuses on all students. Whether or not the law passes constitutional muster regarding federalism remains the central question that this author proposes to examine.

## **Research Questions**

### **Primary question.**

Do portions of the No Child Left Behind Act that represent federal action violate any of the constitutional provisions governing federalism? If no, how so? If yes, in what respects? Federalism's English root is "federal" which derives from the Latin *foeder-*, *foedus* meaning compact or league. According to *Merriam-Webster's Dictionary of Law* (1996), federal refers to "a form of government in which power is distributed between a central authority and a number of constituent territorial units (as states)" (p. 189). The same dictionary defines federalism as the "distribution of power in a federation ... especially the allocation of significant lawmaking powers to those constituent units" (p. 189). Regarding the United States, federalism then concerns itself with the distribution of powers between the federal and state governments. The application of federalism to NCLB lies at the heart of this inquiry.

### **Secondary questions.**

The primary importance of federalism, both constitutionally and procedurally, in addressing major societal issues undergirds both the primary question and the purpose of this study. The Framers embedded federalism in the Constitution, linking it with the doctrines of "separation of powers" and "judicial review" as safeguards against the development of tyranny in American government. Developed by the Framers, confirmed by each state ratifying convention, and reaffirmed by subsequent Supreme Court decisions, the constitutional importance of federalism has been well established as a deep, fundamental, uniquely American tradition. As viewed by this study, federalism as a procedural public policy approach links systems thinking and adaptive work to form a powerful triumvirate, which, this writer believes, forms the only means with which to realize the underlying goal of the No Child Left Behind Act. The public policy aspect of federalism's importance gives rise to three related questions:

- Does NCLB take a systems approach to ensuring that no child gets left behind in America when viewed through the lens of Senge's systems perspective?
- Given the goal of NCLB and the incongruence between the goal of ensuring that no children are left behind and the current reality in America whereby achievement gaps exist between classes of students grouped by race and by socioeconomic status, does NCLB utilize adaptive work as articulated by Heifetz in order to close the gap between America's current reality and the goal of NCLB?
- Does NCLB represent a public policy approach based upon federalism in which the states are viewed as co-partners and as laboratories of experimentation engaged in finding solutions to a complex problem?

The answers to the secondary questions will provide fundamental support to the inquiry established by the primary question.

## **Research Design**

### **Theoretical background.**

The research framework used to examine the primary question posed for this study flows from the tradition of legal analysis. The major works about both the quantitative and the qualitative research traditions don't directly address the research structure of legal analysis.<sup>5</sup> To become better informed about the structure of legal analytic work, I contacted law school personnel, analyzed the structure of several law review articles, and reviewed the organizational structure of previous doctoral dissertations that had focused on an analysis of legal questions. First, I contacted Susan Katcher, Senior Lecturer in Law and Associated Director of the Legal Studies Center, University of Wisconsin Law School in Madison, WI, and inquired about the format followed by legal scholars writing dissertations for the LL.M and S.J.D. graduate law

degrees. Noting that the structure varied “depending upon the nature of the specific research project,” she recommended that I “look at recently published law review articles in established law review journals to notice the scope of research models that have been used” (S. Katcher, personal communication, December 2, 2002). She also offered the following advice:

Since the [structure for legal analysis] can be variable, you would probably want to develop one that fits your particular project best, noting perhaps in an introduction to the proposal that more typical research models don't seem appropriate to your task and thus you are going to be taking such-and-such approach towards your research. (S. Katcher, personal communication, December 2, 2002)

Taking her advice, I next turned my attention to an examination of law review articles (see Appendix D) followed by an analysis of the organizational structure of dissertations focusing upon an analysis of legal and constitutional issues (see Appendix E). Generally, both the law review articles and the dissertations with a legal focus followed a similar pattern. First, an introductory section presented the context or historical development of a legal problem; specifically identified the problem and described the author's focus in providing a legal analysis of the problem; and illustrated the organizational pattern of the analysis by briefly noting the following sections and listing the focus of each section. Thus, the introduction established the organizational framework for the resulting legal analysis. In their description of qualitative research Gall, Gall, & Borg (2003) recognized this pattern when they noted that “certain aspects of the research design are likely to be emergent” (p. 45). Table 1 below compares the organizational patterns of the quantitative/qualitative research traditions with the general pattern of legal analysis.

As a final step I reviewed several leading authorities' books that focused on legal research. Looking at Table 1 above, one noticeable surface difference between the traditional research traditions, i.e., quantitative and qualitative, and legal analysis appears to be the absence

of any literature review in legal analysis. Actually, as will be shown, such an assumption is unwarranted. Besides being embedded in the process of conducting a legal analysis, literature reviews also take a different form. Each legal concept requires its own “lit” review that consists of reviewing law review articles about the legal concept being examined as well as searching for specific court rulings, which featured the legal concept under consideration.

*Table 1:  
Comparison of Organizational Patterns for Doctoral Theses by Research Traditions.*

Quantitative & Qualitative	Legal Analysis
<ol style="list-style-type: none"> <li>1. Introduction.</li> <li>2. Review of the Literature.</li> <li>3. Research Method.</li> <li>4. Research Findings.</li> <li>5. Discussion.</li> </ol>	<ol style="list-style-type: none"> <li>1. Introduction.</li> <li>2. First Legal Concept/Issue.</li> <li>3. Second Legal Concept/Issue.</li> <li>4. Third Legal Concept/Issue.</li> <li>5. Conclusions.</li> </ol>

Legal analysis actually consists of two basic methods, the case law method and constitutional research. Typically, the majority of legal analysis research involves using the case law method. In using this method, the researcher is examining a particular set of facts and trying to build a legal argument around them. Because the American legal system is based on the doctrine of *stare decisis* (literally, “Let the decision stand,” or, previous court decisions shall guide the present ruling so that legal answers to similar questions of law are consistent), the researcher is searching for cases that are factually similar to the set of facts being examined (Hall, 1992, p. 663; Roberts & Schlueter, pp. 2-3). The researcher is also examining various laws and administrative rules that may bear on a particular set of facts.

The preceding approach differs in important respects from constitutional research as noted below:

Most research into what the law is on a particular topic does not involve constitutional research. This is because statutes and regulations define the law in most instances. However, you may find yourself doing constitutional research if you suspect a statute or regulation is unconstitutional. (Elias & Levinkind, p. 6/3)

And what if the issue also involves a conflict between federal and state authority, in which the constitutional provisions surrounding federalism are thought to be violated by either of federalism's partners? Two noted authorities in legal research offered the following:

Although the federal and state governments are independent governments, they sometimes regulate some of the same areas... Who controls varies. Often a determination of which of the conflicting authorities governs is decided by reviewing the Constitution. ... The federal courts sometimes are asked to decide who controls. The courts may look to the Constitution for guidance or may consider what has pervasively regulated an area. For example, if a case involves a section of the U.S. Constitution, the U.S. Supreme Court is the final authority. (Yelin & Samborn, p. 21)

If constitutional issues are thought to be involved, legal research experts recommend the following methods.<sup>6</sup> First, the constitutional issue(s) involved need to be identified. Then, for each constitutional issue noted, a review needs to be conducted which involves examining background resources, i.e., books about constitutional law and/or about the specific constitutional provision being investigated, and law review articles. As one expert noted, these sources "provide a wealth of information about the historical background of the Constitution and its provisions" (Roberts & Schlueter, p. 30). They also point the way to specific court rulings that interpret the meaning and applications of the constitutional provisions, both those which are permitted and those which are prohibited. The constitutional researcher may also locate court rulings interpreting constitutional provisions by examining the *United States Code Annotated* (published by West Group) and the *United States Code Service* (published by LEXIS Publishing). This process is referred to as finding the "interpretive case law" (Roberts & Schlueter, p. 33). The penultimate step in researching a federal constitutional problem is to



update the interpretative case law by reviewing the appropriate SHEPARD'S *U.S. Citations*.

The final step is to analyze the collected material and construct a legal argument based on your analysis.

The frameworks used to examine the secondary questions focusing upon the procedural importance of federalism as a public policy approach are based upon rational analysis and will offer two critical perspectives for viewing the No Child Left Behind Act. The procedural aspects of federalism as a public policy form the connecting thread running through the two critical perspectives, each of which is formed by argument and logical analysis.

The two critical perspectives, each centering upon one of the secondary questions, derive from two theoretical concepts, Peter Senge's model of systems thinking and Ron Heifetz' concept of adaptive work. The framework for each concept will be used as a lens with which to critically view the No Child Left Behind Act. These complementary views will serve to highlight the importance of federalism in achieving the ultimate goal of NCLB, that of ensuring that no children in America get left behind.

Finally, a qualitative study centering on the thoughts and views of two Midwestern leaders of state educational systems – Doug Christensen, Commissioner of Education in Nebraska, and Ted Stilwill, Director of the Iowa Department of Education – will inform the questions deriving from the three analytical frameworks of constitutional federalism, systems thinking, and adaptive work.<sup>7</sup> Their thoughts about NCLB were collected in the spring of 2003 (a time period subsequent to the enactment of NCLB) as part of a qualitative research study conducted by the author under the supervision of Dr. Sally Beisser at Drake University.<sup>8</sup> Having responsibility for the leadership of public education in their respective states, both prior and subsequent to the enactment of NCLB, both Dr. Christensen and Mr. Stilwill were uniquely

positioned to provide both information and critical perspectives regarding the nature of NCLB's impact on their respective state's system of public education. Neither was new to the position of state educational leader at the time NCLB was enacted, so their views were quite informed about public education.

### **Implementation of the constitutional research method.**

Since the first step involved identifying constitutional issues, I began with the concept of federalism as initially defined by the Tenth Amendment. The next task involved investigating background materials. The following materials were examined, some partially, some wholly. They are listed alphabetically by author. For brevity, I've included only the author, date of publication, and title. Complete information about each may be found in the reference list.

- Alexander, K. & Alexander, M.D. (2001). *American public school law*. 5th Edition.
- Amar, A.R. (1998). *The Bill of Rights: Creation and reconstruction*.
- Bowen, C.D. (1966). *Miracle at Philadelphia: The story of the Constitutional Convention May to September 1787*.
- Chase, H.W. & Ducat, C.R. (Ed.) (1978). *Edward S. Corwin's the Constitution and what it means today*. 14<sup>th</sup> Edition.
- Farrand, M. (1913). *The framing of the Constitution of the United States*.
- Hall, K.L. (Ed.) (1999). *The Oxford guide to United States Supreme Court decisions*.
- Hall, K.L. (Ed.) (1992). *The Oxford companion to the Supreme Court of the United States*.
- McCloskey, R.G. (2000). *The American Supreme Court*. Third Edition (Revised by S. Levinson).

- Rakove, J.N. (1996). *Original meanings: Politics and ideas in the making of the Constitution.*
- Rossiter, C. (1987, 1966). *1787 the grand convention.*
- Rossiter, C. (Ed.) (1999, 1961). *The federalist papers.*
- Schwartz, B. (1993). *A history of the Supreme Court.*
- Story, J. (1986). *A familiar exposition of the Constitution of the United States.*

Using both the law libraries at The University of Iowa and Drake University, I conducted searches of law journals, using “federalism” and “United States” as keywords. Several were located and examined; however, I will mention only one because: a) it deeply influenced and expanded my thinking; and b) the others will be cited in the respective chapters of this dissertation as specific constitutional issues are examined. I refer to Professor Merritt’s article which highlighted the Guarantee Clause as a bulwark of federalism, “The Guarantee Clause and State Autonomy: Federalism for a Third Century,” published in the January 1988 issue of the *Columbia Law Review*. At the time the article was published, Dr. Merritt served as Assistant Professor of Law, University of Illinois College of Law. In 2002 she served as Professor of Law, Ohio State University College of Law where she teaches constitutional law as one of her specialties. Professor Merritt also serves as Director, John Glenn Institute for Public Policy and Service, Ohio State University. As a result of my background reading, consisting primarily of the books listed above in addition to Dr. Merritt’s article, I expanded my original list of constitutional issues to include the following:

- the Tenth Amendment;
- the Guarantee Clause; and
- the Fourteenth Amendment.

I contacted Dr. M. David Alexander, author of an authoritative school law text and Chair of the Department of Educational Leadership and Policy Studies at Virginia Polytechnic Institute and State University, and shared both my project and thoughts with him, asking for a critical response. He confirmed the constitutional issues listed above and suggested another for investigation, the Eleventh Amendment (M.D. Alexander, personal e-mail communication, March 26, 2002). Dr. Alexander also generously sent along a paper he helped present at the annual conference of the Educational Law Conference in November 2000 that discussed federalism and the Eleventh Amendment rulings of the Rehnquist Court. And so, the list of constitutional issues raised by the federal No Child Left Behind Act was expanded to include the Eleventh Amendment. The final list derives from three main sources – my background reading, Professor Deborah Merritt's article, and Dr. M. David Alexander's helpful response to my query.

There remains the implementation of the next steps of the constitutional research method – location of court cases and identifying the body of interpretive case law surrounding each constitutional issue. This will be completed in each of the succeeding chapters following chapter 4 by focusing upon each constitutional issue relating to federalism. Finally, the collective issues will be analyzed and a judgment made as to whether or not NCLB violates any of the principles of federalism addressed by this inquiry.

### **Organization and Scope of the Study**

Both the constitutional and procedural importance of federalism as a policy approach for realizing the goal of the No Child Left Behind Act will be established prior to the actual examination of the constitutional issues surrounding federalism raised by the congressional passage of NCLB. Chapters two through four will focus upon the importance of federalism. The

constitutional components undergirding federalism will then occupy center stage for the remainder of this study.

**Chapters 2-4: Analytical frameworks for federalism as a public policy approach, for systems thinking, and for adaptive work.**

First, the contents of NCLB's requirements for state action will be presented in Chapter Two immediately followed by the views of two state educational directors of public education regarding the implementation of NCLB in their respective states. These views derive from a qualitative study conducted by the author in the late spring and early summer of 2003 that examined the intersection of federalism and the No Child Left Behind Act. Chapter Three will explain federalism, discuss its purpose from the Framers' perspective and from subsequent Supreme Court opinions, briefly describe the constitutional components of federalism, and discuss NCLB as a policy approach in terms of federalism.

Chapter four will analyze NCLB from the perspective of two analytical frameworks, each of which will identify shortcomings that can only be addressed through a viable and constitutionally sound federalism. The first framework is a systems model developed by Peter Senge (Senge, 1994). Appropriate to education, Senge's model of systems thinking centers on developing a learning organization built upon developing mastery in five disciplines. The disciplines include mental models, personal mastery, shared vision, team learning, and systems thinking. NCLB will be analyzed from the perspective of each discipline.

The second analytical framework is Ronald Heifetz' concept of adaptive work (Heifetz, 1994). Heifetz coined the term to describe changes in beliefs, attitudes, and beliefs that need to occur around significant problems for which there appear to be no current solutions. NCLB will be analyzed in terms of its approach to adaptive work. Both frameworks, Senge's systems thinking and Heifetz' adaptive work, directly answer an important secondary question – by

focusing on only one system (public education) impacting the well-being of children in our society, does NCLB perpetuate a nonsystemic approach to a vitally important area and thus avoid engaging people in the work needed in order to effect needed improvement?

### **Chapters 5-8: Analytical framework for constitutional federalism.**

Chapters five through eight will focus on examining the constitutional issues raised by the No Child Left Behind Act. This analysis will focus upon the emergence of interpretive case law as courts began to referee the arguments regarding the exact meaning of federalism and how power was to be distributed between the state and federal governments. Following somewhat chronologically according to the judicial development of federalism as a concept, this discussion will focus upon emerging interpretive case law regarding the Guarantee Clause, the Tenth Amendment, the Fourteenth Amendment, and the most recent development, the Eleventh Amendment. To enhance understanding, the historical development of each constitutional component listed previously will be provided. It is the author's belief that text without context provides a poor basis for the full comprehension and understanding required for analysis and application in that interesting intersection of legal facts and principles, on the one hand, and, on the other hand, the subject matter of life.

All cases will be either summarized or briefed. Those cases to be summarized fall into two major categories: 1) those cases prior to the mid-twentieth century which presented the opposing arguments in detail; and, 2) those cases subsequent to the mid-twentieth century which no longer feature the opposing arguments. All cases falling within the second category will be summarized in order to avoid the inherent bias within the reported opinions regarding the reporting of the two opposing sets of legal arguments presented by the appellee or the appellant attorneys (some arguments are summarized and addressed within the Court's opinion, some are

not; other arguments can be inferred from the Court’s opinion). Cases falling within the first category to be summarized will be selected according to the following criteria: a) the central legal question does not directly involve a constitutional issue under consideration; b) the constitutional issues of federalism play a secondary role in the court’s decision; c) the case is not one that is cited by subsequent cases as bearing on federalism; d) the case upholds a previous decision bearing on federalism without venturing into new territory vis-à-vis legal reasoning. The format for summarized cases will include two main headings: 1) case summary; 2) significance for the federalism issue under consideration, e.g., “Significance for the Guarantee Clause,” etc. (See Figure 1).

*Figure 1:  
Summary Format for Court Cases*

<b>Case Description</b>	
Case Summary	
Significance for the Federalism Principle Under Discussion	

The criteria for cases that will be briefed include: a) the central legal question of the case directly involves the constitutional issue under consideration for the particular chapter; b) the case is cited as controlling by subsequent court opinions; c) the case possesses a dissent capable of being the basis for a majority ruling at a later date. Court cases selected to be briefed will follow the format in Figure 2.<sup>9</sup>

The “Case Description” will include the case name, legal citation, and the year of the opinion. The “Facts & Procedural History” portion will present the events giving rise to the lawsuit and its journey through the court system from the time the plaintiff first filed suit until the decision was appealed. The “Legal Question” will provide information about what the court

is being asked to decide. It will be stated as a question (or questions) that can be answered yes or no. The portion, “Legal Reasoning of Opposing Sides,” will summarize the legal arguments used by both sides regarding the legal question(s). This section will articulate the difference in position of the two parties. The “Holding & Disposition” will answer the legal question(s) under dispute and will provide information about who won, who lost, and what happened next with the case. The “Court’s Rationale” part of the brief will explain the logical steps in the court’s reasoning process and provide the rational argument upon which the judicial decision rests. It will summarize the court’s reasoning and explain the guiding principles the court selected from prior statutory and/or case law to apply to the facts of the case in order to reach its ruling. The last portion of the brief, “Concurring/Dissenting Opinions” will either summarize the opinion in fashion similar to the “Court’s Rationale” section or will summarize the critical differences between the reasoning of the differing opinion and that of the majority.

*Figure 2:  
Brief Format for Court Cases*

<b>Case Description</b>
Facts & Procedural History
Legal Question(s)
Legal Reasoning of Opposing Parties
Holding & Disposition
Court’s Rationale
Concurring/Dissenting Opinions

Also, a word about U.S. Supreme Court case citations under three sets of circumstances. Cases that have their own headings will be cited in their correct legal format, i.e., the volume number of the case report series, the abbreviated name of the case report series, and the page number in the volume where the report begins. An example would be *Brown v. Board of*



*Education*, 347 U.S. 483 (1954). “347 U.S.” references the volume number of the *U.S. Reports*, the report series for all U.S. Supreme Court cases. “483” indicates the page number on which the case report begins while “(1954)” reports the year in which the case was decided. The second circumstance involves discussion of a particular case under its own heading. In these situations, only the page number of the court report containing the section being quoted will be cited. The third situation occurs when reference to a case is made at a different location in the paper, i.e., not in its particular section of this study. By way of example, one of the most quoted parts of the Brown decision references education as one of the most important responsibilities of state and local governments. That quote is made on page 493 of the Court’s report and would be referenced as follows: 347 U.S. 483, 493. References to federal district court decisions and federal circuit court cases will follow the same format, the only difference being the abbreviated name of the report series. Federal courts of appeals decisions are contained in the *Federal Reporter* series and will be abbreviated F., F.2d, or F.3d. Federal district court decisions since 1932 are contained in the *Federal Supplement* series and are abbreviated F.Supp. or F.Supp. 2d.

There are, of course, a few cases that could fall under more than one of the major federalism headings, i.e., the Guarantee Clause and the Tenth, Eleventh, and Fourteenth Amendments. When a case has been briefed or summarized in a previous section, but has some relevance to the particular subsection of federalism case law being investigated, the format will contain two main headings: 1) Location of Case Previously Briefed/Summarized; and 2) Significance for the Tenth (or Eleventh or Fourteenth) Amendment. Within each of the categories of constitutional issues the cases will be presented in chronological order. The decisions regarding whether to brief or to summarize are neither expert nor infallible, but they are reasonable and defensible. Finally, an overall analysis of the constitutional and public policy

components of federalism will be presented as they relate specifically to the No Child Left Behind Act.

### **Use of apa, sixth edition, guidelines**

The manuscript implements APA (American Psychological Association) recommendations throughout the study with one minor exception regarding the fourth level of the five-level model for formatting headings. The formatting requirement for fourth-level headings requires that headings be “[i]ndented, [in] boldface, italicized, lowercase [type, i.e., with] the first letter of the first word [being] uppercase and the remaining words ... lowercase” (American Psychological Association, p. 62 & p. 62, n. b). Those requirements are followed exactly EXCEPT when court cases with their full legal citation constitute the fourth level of heading. In those instances, all in chapters five through eight, the legal formatting requirement will supersede the APA requirements regarding CAPITALIZATION only. According to APA guidelines, the heading for the case discussion of *Brown v. Board of Education* would be: ***Brown v. board of education, 347 u.s. 483 (1954).*** Instead, in chapters five through eight, the legal formatting requirement requirements will be followed along with the APA requirements regarding boldface and italicized print (along with indentation), the heading would be: ***Brown v. Board of Education, 347 U.S. 483 (1954).*** The APA requirement requiring only lowercase print will be disregarded in these instances only. This minor adjustment will act to maintain clarity and consistency of legal citations throughout the manuscript.

### **Mental Model**

#### **What is a mental model?**

Whether you call it a paradigm, philosophy, or mental model, is unimportant because each of the previous names serves a similar purpose – guiding our perceptions by drawing

attention to what we think is important and ignoring both what we take for granted and what we think is unimportant. Thus they guide what we consciously view and upon what we fix both our attention and efforts.

Thomas Kuhn's work on the history of the development of scientific theories drew on Gestalt psychology in his analysis of how conceptual worldviews replaced one another in the field of science. The Gestalt view of perception hinged on the division between figure and ground. Figure constituted what was important and of interest to the viewer. Ground consisted of what was taken for granted, what we often refer to as "hidden assumptions" and "unexamined values." According to Kuhn, scientific theories replaced previous theories according to changes in what was viewed as figure and what became ground – what was one theory's figure became another theory's ground and vice versa.

[E]very problem that normal science sees as a puzzle can be seen, from another viewpoint, as a counterinstance and thus as a source of crisis. Copernicus saw as counterinstances what most of Ptolemy's other successors had seen as puzzles in the match between observation and theory. (Kuhn, p. 79)

Utilizing terms, which became popularized in the 1990's, Kuhn talked of paradigm and paradigm shifts as determining what could be taken for granted and upon what should attention be focused.

In the absence of a paradigm or some candidate for paradigm, all of the facts that could possibly pertain to the development of a given science are likely to seem equally relevant... [T]he paradigm forces scientists to investigate some part of nature in a detail and depth that would otherwise be unimaginable. (Kuhn, pp. 15, 24)

What Kuhn found mysterious was the process by which thinkers shifted the governing figure-ground configurations:

What the nature of that final stage is – how an individual invents a new way of giving order to data now all assembled – must here remain inscrutable and may be permanently so. Almost always the men who achieve these fundamental inventions of a new paradigm have been either very young or

very new to the field whose paradigm they change. ...[O]bviously these are the men who, being little committed by prior practice to the traditional rules of normal science, are particularly likely to see that those rules no longer define a playable game and to conceive another set that can replace them. (Kuhn, pp. 89-90)

Much of Peter Senge's discussion of mental models in *The Fifth Discipline* corresponds to Kuhn's concept of paradigms and their importance in directing thought and attention.

According to Senge, mental models "are deeply ingrained assumptions ... that influence how we understand the world and how we take action" (Senge, 1994, p. 8). Mental models guide our thinking about "what or cannot be done," thus determining acceptance or rejection of new insights into what is possible (Senge, 1994, p. 8).

Because mental models determine figure-ground relationships, part of Senge's solution to the limitations of mental models was to "focus on openness needed to unearth shortcomings in our present ways of seeing the world" (Senge, 1994, p. 12). Since mental models govern how people continually create reality and how they change it, the reader should have some understanding of this writer's beliefs, experiences, and values. Hopefully, such openness will help the reader guard against being uncritically influenced by the writer's beliefs, values, and assumptions in addition to providing the reader with insight into the writer's reasoning and into the writer's choices of what constitutes figure and ground. I provide such information in the spirit with which Senge described how mental models are both deeply embedded and extensively intertwined into individual psyches. According to Senge, "We do not 'have' mental models. We 'are' our mental models. They are the medium through which the world and we interact. They are inextricably woven into our personal life history and sense of who we are" (Senge, 1994, p. xv). Caveat lector.

### **My perspective.**

I am neither an attorney nor a law school student. I am looking at the constitutional issues governing federalism from the point of view of a public educator and an educated citizen. Having spent my entire professional career in education as either a teacher or an administrator at the elementary, middle school, and high school levels, my perspective is not that of a person trained in the practice of law. In this respect, my situation is somewhat similar to that of the many citizens who participated in one of the greatest debates held in our country's history, the debates in each of the original thirteen states determining whether or not the Constitution emanating from the Constitutional Convention of 1787 would be ratified and thus become the "Supreme Law of the Land."

The constitutional framers envisioned a citizenry capable of understanding and discussing the Constitution and its application to American political life. They did not anticipate that it would be necessary to have a law degree in order to discuss and analyze constitutional issues. As a matter of fact, a considerable number of the constitutional framers had no training in the practice of law, but they were both educated and thoughtful. As one commentator observed, "Not the least surprising characteristic of the Federal Convention was that, contrary to the tradition of political assemblies, it let itself be swayed by men of thought and historical perspective" (Bowen, p. 179). Another constitutional scholar remarked on the expectation that citizens had been and were expected to continue to be involved in applying constitutional principles to their current political life:

Finally, government in a republic is properly the concern of all those who have an enduring attachment to the community. ...Within the American consensus there were, to be sure, sharp differences of emphasis, especially over the application of these constitutional abstractions to concrete problems of governing free men. (Rossiter, p. 64)

Alexander Hamilton attended to this issue as well when he addressed the “people of America” in the first of what became known as *The Federalist Papers*:

[Y]ou are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance... It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. (Federalist No. 1, p. 1)

One might wonder that with the adoption of the Constitution by a previous generation of citizens, it would be expected that subsequent constitutional questions would be handled primarily by legal specialists. In a later paper, Hamilton again stated the intention that American citizens would need to become involved in constitutional issues:

If the federal government should overpass the just bounds of its authority and make tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify. (Federalist No. 33, p. 171)

It is in that spirit that I venture forth. The emphasis will be on detecting possible infringements of the constitutional principles of federalism and its public policy aspects, not on declaring parts of the No Child Left Behind Act unconstitutional. The tools that will be brought to bear on this task include critical thought, logical analysis, historical perspective, rational argument, constitutional analysis, an educational background grounded in history, political science & philosophy, and a career spent as a teacher and administrator in both tribal and public education at the elementary, middle school, and high school levels. Each reader will need to determine both the strengths and shortcomings of such an approach.

## **Summary**

This chapter began with a statement of purpose, which is to examine constitutional issues surrounding federalism and the No Child Left Behind Act. In stating the nature of the problem, I discussed federalism, Iowa's educational system, and problematic components of NCLB. The research design will follow the legal analysis structure derived from triangulating expert opinion, examination of law review articles, and review of previous doctoral dissertations focusing on legal issues. This triangulation was further validated by an examination of expert opinion in the field of legal research, specifically three major works on the subject. The primary research question guiding this study is, "Do portions of the No Child Left Behind Act violate any of the constitutional provisions governing federalism?" The secondary research questions analyze NCLB from the perspectives of systems thinking, adaptive work, and federalism as a public policy approach. Next, I discussed the specifics of this study's organizational structure which flow from the research question and the legal issues involved, i.e., federalism as understood by the Constitution, the Constitutional debates, the Spending Clause, the Guarantee Clause, the Tenth Amendment, the Eleventh Amendment, the Fourteenth Amendment, and the case law resulting from various courts' interpretations of what exactly federalism means in a variety of contexts. Finally, I presented the concept of mental model as a guide to individual perceptions, both in terms of what attention is focused upon and what is taken for granted. Information about my own perspective was presented to inform readers of this study.

## **Chapter 2**

### **What Is NCLB?**

#### **Introduction**

NCLB, the acronym for the congressional No Child Left Behind Act, was enacted on December 18, 2001 and officially went into effect on January 8, 2002. Described as President Bush's education program, NCLB was "written largely by the White House" (Rothstein, 2001, p. D9). Officially entitled the "Federal Re-authorization of the Elementary and Secondary Education Act," NCLB significantly changed the federal role in education. Previous enactments of ESEA, also known as Title I, had provided supplemental assistance to states and public schools that was targeted towards reading and math instruction for students deemed in need of assistance. The federal role in setting and controlling educational policy had been minimal. With the passage of NCLB the federal government "dictate(d) to states" what the educational policy of individual states should be (School Administrators of Iowa, p. 1). The change from supplemental to controlling thus represented a seismic shift in the federal role in education. It also should be noted that NCLB targeted only public education. No private schools were affected by the legislation.

#### **The Contents of NCLB's Requirements for the States**

What exactly did the 1,200-page bill require? Described as a bill "that would dramatically extend the federal role in public education," NCLB contained numerous federal mandates for the states (Schemo, p. A32).

- All states are required to administer state tests in reading and math every year to every public school student in grades 3 through 8 as well as one high school grade level. Science was to be phased in at a later date.



- Each state is required to establish a minimum level of proficiency for each of the 14 state exams.
- Each state is required to report to the federal government the proficiency levels obtained by all students on each of the 14 exams.
- Each state is also required to report disaggregated proficiency levels for each of the 14 exams. Required disaggregated data includes proficiency levels by subgroups of the student population at each grade level according to race/ethnicity, socioeconomic status, English Language status, gender, and disability status. For example, a school containing three racial/ethnic groups would have the following score report requirements for third-grade reading:
  - Aggregate proficiency (all students).
  - Hispanic proficiency.
  - American Indian proficiency.
  - White proficiency.
  - Eligible for Free/Reduced-Price Lunch proficiency.
  - Non-eligible for Free/Reduced-Price Lunch proficiency.
  - ELL proficiency (English Language Learner).
  - Non-ELL proficiency.
  - Female proficiency.
  - Male proficiency.
  - IEP proficiency (special education students).
  - Non-IEP proficiency.

Of course, this would have to be repeated not only for third-grade math, but also for the remaining 12 exams (reading and math exams at grades 4, 5, 6, 7, 8, & HS) as well as for science once that was phased in.

- Each state is required to identify and report “poorly performing” schools, that is, those schools performing below the minimum level as initially set by the state and approved by the federal government.
- Each state is required to enforce an escalating set of sanctions against the public schools in its jurisdiction that have been designated as “poorly performing.” These sanctions include:
  - In Year 1, any student in the “poorly performing” school would be eligible to transfer to a better-performing public school. Transportation costs would be carved out of the district’s existing Title I funds.
  - In Year 2, low-achieving students would be eligible for tutoring, summer school, and other supplemental services which could be provided by religious institutions, private companies, or nonprofit organizations. Those services would be paid for by the district out of its federal Title I funds. In addition, the district would continue to pay transportation expenses for those students wishing to attend better-performing schools in the district.
  - Schools failing to make adequate progress after two years become subject to having teachers and administrators replaced, its curriculum revamped, or being converted to a charter school.

- Each state is required to administer the National Assessment of Educational Progress each year to a representative sample of students (as determined by the federal government) in order to assess the adequacy of state-established standards. The NAEP testing requirement for each state is in addition to the state-administered tests in reading and math to all students in grades 3 through 8 as well as one high school grade level.
- Each state is required to submit to the federal Department of Education its plan for:
  - ensuring that all public schools in its jurisdiction will be in compliance with all of the mandates listed above.
  - ensuring that all subgroups achieve proficiency at the end of 13 years through annual improvement known as “Adequate Yearly Progress.” This becomes known as an AYP goal. Generally, schools with subgroups not making the AYP goal for two consecutive years will be labeled a “poorly performing” school.

States are required to revise plans deemed unacceptable by the U.S. Department of Education until such time as they become acceptable to the federal government. For example, Iowa’s initial plan was not approved and was sent back to be revised.

- Each state is required to develop a plan for ensuring that “highly qualified” teachers are placed in every classroom within four years.
- Each state is required to ensure that each public school district within its jurisdiction only enacts instructional programs with a “scientific research base.”
- Each state is required to ensure that all third-graders are reading at grade level.

### **NCLB as Viewed by Two State Educational Leaders**

Under the federal law, departments of education in the various states had to scramble to develop plans for implementing the requirements of NCLB, which then had to be approved by the U.S. Department of Education. To investigate views about the issues raised by NCLB from the top educational leadership in two Midwestern states, each with national reputations for educational excellence as measured by student achievement, two state directors of education were interviewed – Doug Christensen, Commissioner of Education in Nebraska, and Ted Stilwill, Director of the Iowa Department of Education. Both interviews utilized a conversational approach centered on nine basic questions (see Appendix F). The interview with Doug Christensen took place in his office in Lincoln, NE, on April 28, 2003 while the interview with Ted Stilwill occurred in his office in Des Moines, IA on May 14, 2003. Each interview lasted approximately one hour. The questions were structured to be open-ended to elicit the thoughts of each state leader about NCLB in both a wide-ranging, yet specific, way. To facilitate fresh responses to the questions that was based upon their current thinking, the questions were not shared with either director prior to the interview. The interviews were taped and then transcribed before being analyzed thematically. Their comments illuminate three questions: 1) Why NCLB; and 2) What are the problems with NCLB; and 3) What are the benefits of NCLB? Responses to the three questions are grouped in the following sections.<sup>10</sup>

### **Why nclb?**

Christensen attributed a number of reasons for congressional passage of NCLB. First, he believed that if 9-11 hadn't happened, NCLB would either have not passed or it would have been passed in a different form than it currently possesses. Since a foreign attack took place on American soil for the first time in the twentieth century, NCLB took on a different look, a look that brought a measure of stability, a sense that the country was moving again, that America was

"getting back to normal" (Christensen, p. 4). Also, being a "Republican" Congress, Republicans wanted to deliver a major piece of legislation for a Republican President. Christensen found this somewhat ironic, because some measure of NCLB had been proposed previously by President Clinton, a Democrat. As Christensen described it, when President Clinton had earlier proposed a national test, "every Republican went berserk" (Christensen, p. 4).

NCLB also occurred because of a deadly combination of ignorance and positive sound bites. Congressmen voted not knowing the details of what they were voting on because it "was written behind a closed door" (Christensen, p. 5). According to Christensen, the Nebraska Senators and Representatives reported to him that they were unable to find out the content of what they were voting on. And then when it was released, it was a massive tome in excess of "twelve hundred pages" that no one had the time to read (Christensen, p. 5). Ignorance, a national crisis, a sense of wanting to see the country moving ahead towards normalcy – all of these combined to forge a non-critical stance towards NCLB – that and the fact that everyone got caught up in the "buzz words" of NCLB or as Christensen observed, "Well, how could something be wrong that's named 'No Child Left Behind.' It has flexibility, more money... more equity for all kids, I mean, what's wrong with that" (Christensen, p. 6)? Most critical, in all the mix, was 9-11. Without it, Christensen believed that calm, deliberate debate would have occurred in which "all of the warts of No Child Left Behind would have been exposed" (Christensen, p. 4).

Finally, Christensen perceived a sinister force at work, a desire to discredit American public education. He noted early in the conversation that "you can't have a conversation about alternatives to public education until you can prove that public education isn't working" (Christensen, p. 8). A hint of the ethical issues involved is provided by the final words spoken

by Christensen' in the interview, words he used to characterize the No Child Left Behind legislation:

...this is not about improving public education. This is about embarrassing public education, so that we can have a conversation about choice and vouchers and charter schools. Because if it was about improving public education, we wouldn't do it this way. Nobody would. I mean even the staunchest Republicans would not do it this way. (Christensen, p. 22)

Stilwill viewed the context in which NCLB occurred in simpler overall terms, but in greater complexity regarding the specific support for NCLB. Basically, in terms of the context, Stilwill believed NCLB occurred because there exists a national interest "in having our educational system do better than it's doing today" (Stilwill, 2003, May 14, p. 5; unless otherwise noted, all subsequent references to Stilwill in this section will refer to this date and will reference only his name and the page number). High school diplomas are no longer a guarantee of a decent job. Nowadays, according to Stilwill, good jobs require some type of degree in postsecondary education, either a two-year or a four-year degree. As he described it:

Well, that's a very new expectation for K-12 districts, that a very high percentage, I mean a very high – 90% of their kids – would be prepared to the level where they could succeed in postsecondary education... ... now the expectations have escalated well beyond whatever was agreed upon for what the current system was supposed to deliver. (Stilwill, p. 5)

Stilwill concurred with Christensen's finding that Senators and Representatives did not understand what they were voting for when they approved the No Child Left Behind legislation. Stilwill reported that at least one Representative reported to him that he didn't fully understand the way it would play out when he voted for NCLB. And, Stilwill noted, others publicly stated that they "didn't realize it was going to have this kind of an impact on Iowa," that they believed "because of Iowa's lead position perhaps much of this law might not apply" (Stilwill, p. 2). Stilwill didn't fault the legislators because it was "complex legislation," the kind in which you

"have to make a lot of assumptions that other people have done that kind of homework" (Stilwill, p. 2). Taking a pragmatic, accepting view of the fact that Iowa's Senators and Representatives voted for legislation without understanding it, Stilwill observed with a shrug, "And I know that that happens" (Stilwill, p. 2).

Noting the complexity of the support for NCLB, Stilwill described it as a "coalition" that is not always "cohesive on a day-to-day basis," but it just so happened that they came "to agree at this point in time that this is in their constituents' best interests" (Stilwill, p. 7). One of the coalition partners represented "poor kids and minority kids in large urban areas who had been ignored," who hadn't been getting help they felt they needed (Stilwill, p. 7). They supported NCLB because now their district and state were going to be forced to be accountable for the poor and minority kids. Stilwill described these people as being a combination of "strong advocates of public education" and "particularly strong advocates for those kids" (Stilwill, p. 7).

The strange bedfellows of the coalition were described by Stilwill as being "not terribly strong advocates of public schools" (Stilwill, p. 7). These people, Stilwill noted, viewed public education as "monopolistic and as part of the problem, not part of the solution" (Stilwill, p. 7). Stilwill described this partner of the NCLB coalition as being composed of "advocates of choice" (Stilwill, p. 7). "And," according to Stilwill, "that's a perfectly legitimate policy debate. You know, 'Is education a utility that ought to be offered in the most efficient way as possible to as many people as possible'" (Stilwill, p. 7)?

And so, where Christensen saw ethical problems, Stilwill observed a policy debate.

### **Problems with nclb.**

Both Christensen and Stilwell identified similar, but not identical, problems although Christensen discussed the problems in greater detail. Both identified problems centered within these broad categories:

- systemic problems.
- local control issues.
- negative reinforcement gets motivation wrong.
- unrealistic expectations.
- no recognition of critical differences.

Each, however, gave a slightly different spin to the problems within each of these areas. So while the topics each mentioned were similar, the particulars were different.

For example, Christensen's take on systemic change centered on his interpretation of NCLB as "coming from outside the system" (Christensen, p. 1). According to him,

No one regards the federal government as part of the education system. It is a support place; it's historically been a support place where you provide an incentive for states to move into an area, like vocational education, like gifted, like whatever, but it's never intended to be a regulatory device or be the defining policy related to education. (Christensen, p. 1)

For Christensen, the violation of systemic change linked with another critical area of concern, the way in which NCLB violated the state's system of local control. Christensen stated that local control, the face-to-face interactions in local decision-making, constituted the major reason why education worked as well as it did in the rural midwestern and northeastern states. Local control involves people in important decision-making and promotes a sense of ownership. Christensen compared the local hierarchies (teachers, principals, superintendents, boards, community members) with the state educational hierarchy (state department of education, state



commissioner, state board, legislators, governor, and the public) and observed that in Nebraska, at least, it was still local, it was still largely face-to-face. As Christensen described the state hierarchy, he "could go over there to any of those 49 senators. I could walk into their offices – I mean, it's face to face" (Christensen, p. 2). Moving on to the federal hierarchy, he characterized it in faceless, impersonal terms. "That hierarchy is so remote from what is actually going on in education. It isn't face to face; it's by memo, it's by telephone call, it's by FAX, it's by paging – twelve hundred pages of No Child Left Behind – I mean, give me a break" (Christensen, p. 2).

Stilwill, on the other hand, didn't overtly link systemic problems with violations of local control. In fact, Stilwill didn't use the term "systemic." But he did talk about the nature of change, both in terms of what has worked and what hasn't worked in Iowa. And his examples resonated with pictures of local control; however, the term itself wasn't used. Stilwill couched his discussion of systemic improvement or change using the psychological concepts employed in operant conditioning, what the psychologists refer to as punishment (shame, fear, accountability) and positive reinforcement (pride, positive self-image, personal investment & commitment). Only Stilwill didn't use the language of psychologists. As can be seen, Stilwill discussed these three concepts – systemic change, local control, and punishment versus positive reinforcement – without mentioning them by name.

Talking about problems with NCLB, Stilwill pointed out that the notion of "simply tightening up on accountability" as a way to improve education constituted a "flaw in our thinking at the moment nationally" (Stilwill, p. 5). Noting that we had more than sufficient evidence to indicate that shame and fear were short-term strategies that didn't work well in the long run to effect change, Stilwill observed:

And in Iowa we have excellent evidence that in fact pride is more effective in change, and school districts in Iowa do well because they are invested in

their kids, and they care about what happens to them, and they feel good about what happens to them. (Stilwill, p. 6)

Related to the flaw in national thinking regarding accountability as the means to ratchet-up what was perceived to be an under-performing system of public education, Stilwill observed that he didn't think that in some "15,000 school districts across the United States you can make the argument that, you know, there's just mismanagement and ineptness" (Stilwill, p. 6). Another flaw in national thinking identified by Stilwill regarded the thinking of people who favored private education and didn't support public education. Stilwill observed that no proven educational research was "being used in private education that's not being used in public education" (Stilwill, p. 6). He continued, "There's not a proven track record that's any different that simple privatization is somehow going to create dramatically different results" (Stilwill, p. 6). So, according to Stilwill, NCLB was based on an incorrect premise, the premise that privatization would provide the cure-all for what was perceived as the failure of public education.

Christensen also identified the punishment aspect of NCLB as violating a basic belief about systemic change. Criticizing NCLB as being bad policy no matter at which level, federal or state or local, it was enacted, Christensen stated that Nebraska would never do such a thing to themselves as adopt a policy like NCLB because, "Number One, we don't believe that you get improvement by shaming people" (Christensen, p. 2). Another systemic failure of NCLB identified by Christensen centered on the intertwining of systems change, motivation, and local control – concepts illustrated, but not specifically identified as such, in a revealing portrait of how the law was designed to be implemented at the state level. Noting that policy outcomes were attributed to NCLB, but were never actually specified in the law, Christensen observed:

That, to me, just speaks volumes about the incapacity of this law to generate leadership, because it's "Follow the letter of the law." We fill out workbooks, for gosh sakes. I mean, we had to fill out an AYP workbook. Makes you feel like a child. Makes you feel like, "Well, why don't they just fill it out and then we'll sign it," instead of going through this charade of us filling it out and letting them sign it. I don't think they grasp the notion that you can't generate leadership and discretion and decision-making at a local policy level from afar. (Christensen, p. 3)

Both Christensen and Stilwill identified another problem with NCLB – its uniform requirements across a vast array of differences that don't take those differences into account. Christensen captured the essence of the problem when he noted that NCLB was "a one size fits all" kind of program, the problem being that "none of us are the same size" (Christensen, p. 3). Stilwill pointed out the specifics of how the "one size fits all" mentality of NCLB would play out with English language learners to the detriment of the purpose of education.

... if a student is identified as an English language learner, almost by definition they're not making average yearly progress; that's why they're in that program; that's why they're getting the help. And to penalize the district because they've identified students who need help and are helping them, and even if they help them succeed and now there's a new group coming in, they're going to be penalized for the new group coming in. That's just not very logical, and I'd like to think there could be some adjustments around that. (Stilwill, p. 3)

Stilwill also noted the problems caused by NCLB's failure to recognize the differences posed by another group of students, a group also not fitting into NCLB's one-size-fits-all mold, students with disabilities.

But to assume that somehow kids who are very severely handicapped or even moderately handicapped are going to achieve at exactly the same level as other students may not be appropriate either. That's a more controversial conversation than the English language learners, but I think to some extent again, there's a group of students identified because they need help, because they're not making progress... (Stilwill, p. 3)

Still within the context of the failure to recognize differences, both Stilwill and Christensen pointed out that NCLB failed to account for the wide performance differences in

educational systems across the country. Stilwill observed that NCLB needed to be more realistic in targeting not all schools, but a smaller group of schools that really do need to be more productive in terms of educating students.

For my part, though, one recommendation that seems fairly obvious is that you have to attach a different mathematical formula to a smaller group of schools or school districts who really ought to be the focal point. I don't think anybody thinks it's really productive to identify the majority of schools or the majority of school districts in the state and then line up those progressive sanctions to that large a body of schools or school districts. It's not practical, it's not effective, and I don't think that was the intent of the law. (Stilwill, pp. 2-3)

Christensen spoke bluntly about the clear differences in state educational systems, differences that were not recognized by NCLB.

...if we were California, I'd be shaking in my boots because I'd think they have every reason to stomp on us and say, "What the hell? Your scores are down there at the bottom!" I don't care whether it's your ACT scores or your NAEP scores or your TEM score or whatever, California is number 50. They have no grounds upon which to argue with the feds about, "Why are you doing this to us?" But the Nebraska's and the Iowa's and the Wisconsin's can say, "Wait a minute. There isn't a measure out there that we're not in the top ten. Now tell us what the hell the issue is!" (Christensen, p. 16)

The failure of NCLB to recognize differences, not only among different groups of learners, but also among the different educational systems in place across the country, may be partially responsible for another problem identified by both Christensen and Stilwill, the problem of unrealistic expectations as spelled out in the law. Christensen addressed the issue directly:

We believe that everybody is different, and until we have the resources and all that to make sure everybody starts at the same starting line and is equal – money, time, kids, teachers, and so forth – the idea that they will all at some point be equal down the road is just crazy. ...the idea that somehow something's going to happen at the end, that everybody's going to meet at 100 percent proficiency, is just ludicrous. (Christensen, pp. 2-3)

Stilwill pointed to the "Adequate Yearly Progress" portion of NCLB as being both unrealistic and critical. He foresaw the need for AYP to be adjusted down the road.

... one of the most critical pieces is the "Adequate Yearly Progress" piece, and I know I watched the states do the simulations where they came up with projections that a large number of schools would be identified. It took them several weeks, and they had a testing staff and accountability staff of 20 or 30 people. Well, Congress doesn't always have that kind of staff at their disposal, and they didn't take the time to, you know, ask states how this would play out, or states didn't have credibility, or whatever the case might be. So I think there will be some adjustments down the road because of that. (Stilwill, p. 2)

Christensen also voiced criticism of the Adequate Yearly Progress, or AYP, concept as being both unrealistic and as setting up schools to fail. Although moving his state to comply with NCLB, Christensen also drew a line in the sand with the feds regarding AYP and the manner in which Nebraska would proceed regarding its implementation.

I don't like the AYP from the standpoint it sets schools up at some point, virtually every school is going to hit the wall, like running a marathon. It's just going to hit that wall. I mean, I don't like that. I don't know what to do about that, but that's not the area I'm going to fall on a sword over. You know, we figured out how to put our system into an AYP kind of formula. I mean, I think it's still not good policy, but there is not the area where I think you can build your case for "This is going to be harmful." ...And we set it up so that – and we told them that when they came here for the peer review – we would not identify any more schools than we had the capacity to help. And I said, "That's probably about 25 a year." And I think for the first probably five years, 90% of our schools will be fine. (Christensen, p. 15)

While both might view the failure to recognize differences as possibly leading to unrealistic expectations, Christensen would attribute, in large measure, another causal factor, the desire to discredit public education in order to legitimize a discussion about alternatives to public education. But he does believe, somewhat skeptically, that if the intent of federal legislators was to improve education, it won't work.

Well, if the intent really is improvement, if the intent really is changing public education to something better, if the intent is making sure that all kids

have access to a school system that's going to provide them the maximum benefit of that education, this is not the way to do it. In my opinion, it violates every principle that I know of, every principle that the research says is out there... (Christensen, p. 20)

Stilwill and Christensen each voiced an additional problem that was not mentioned by the other. Stilwill spoke about the requirement of NCLB that schools only "implement research-based teaching strategies and programs" (Stilwill, p. 4). While favoring the notion, Stilwill paraphrased the Director of the newly-created federal Institute of Education Sciences who had commented about what research-based strategies and programs were available to be implemented by schools under NCLB.

Well, Russ Whitehurst, the lead person for research for the U.S. Department of Education, is very honest about the fact that there's pretty good research in reading, not much in math, not much in science, about effective strategies. (Stilwill, p. 4)

So, even if schools wanted to comply with the research-based strategies and programs in the NCLB-targeted areas of science and mathematics, there wouldn't be much available for them in those two areas.

Christensen identified what could be called a violation of good educational principles by NCLB, that is, if the research is correct in indicating that the biggest factor affecting whether or not students learn is the teacher and his/her expertise (see Ferguson, 1991; Hedges, Laine, & Greenwald, 1994; Greenwald, Hedges, & Laine, 1996; and Darling-Hammond, 1998). In Christensen's opinion, the people who actually make a difference in determining whether or not students learn are placed by NCLB "clear down at the bottom" (Christensen, p. 2). He continued:

... classroom teachers now are the last people that have anything to say about what happens under No Child Left Behind. In fact, they're not trusted to have anything to say about it. Superintendents and principals are trusted equally as little, and it's no respect for the local system of education at all –

very little respect for the state system of education and respect only for a particularly slanted view of education at the federal level. (Christensen, p. 2)

As has been shown, both Christensen and Stilwill identified a number of problems associated with the No Child Left Behind Act. In the many examples they provided, several of the problems overlapped and intertwined with each other; that is, in discussing one problem, they often discussed other issues as well. Broadly speaking, the major problems identified by both Stilwill and Christensen dealt with the NCLB legislation:

- exhibiting no understanding of systems change.
- not respecting local control .
- missing the boat on motivation through its emphasis on negative reinforcement.
- posing unrealistic expectations.
- not recognizing important critical differences, both in terms of students and of state educational systems as well as school districts within states.

In addition the state commissioner and the state director each identified a problem not mentioned by the other. And while the problems have been listed separately to facilitate portraying the thoughts of the two state leaders, they intertwine with each other as shown in the following summary viewpoint of what is wrong with NCLB.

It violates everything I know about how you get change to occur, how you get it to be systemic, meaning that, you know, it's got to come from the inside. It does nothing to foster leadership. It creates an environment that I think is just absolutely contrary to all that in that it's a compliance environment. It's compliance with rules, it's test-bound, which is – you know, I believe that assessment is a very valuable piece of learning how to teach and teach well and improving teaching, but this isn't about assessment – it's about testing. And testing becomes a compliance document. It's the ultimate compliance document. And, you know, if you want people to rise to high levels, you have to make a decision whether or not you're going to

be accountable or to be held accountable. And being held accountable makes you a junior partner; it makes you a lesser person in the hierarchy; it makes you a person who can't be given free choice, free will, as opposed to being accountable. (Christensen, p. 21)

### **Benefits of nclb.**

Giving life to the folk saying that "in every dark cloud, there is a silver lining," each state leader mentioned what he viewed as a benefit. Granted, each identified far more problems than benefits, but still, there were some benefits contained in NCLB that they identified.

Stilwill identified three positive aspects of NCLB. First, he viewed it as a first attempt to focus on critical issues that would eventually get better.

It's (pause) – you know, we haven't been looking at national domestic policy in education for very long. Yeah, I think it's going to be there; it needs to be a national issue. It's not going to go away; I don't think it should go away. I think this is the first really comprehensive foray into trying to figure out how to do it. And there's undoubtedly some pieces of it that need to change, and I think probably will change. (Stilwill, p. 1)

Second, Stilwill supported the legislation's demands that schools implement research-based teaching strategies and educational programs. He commented, "There are high demands in the legislation for research-based interventions, you know. And I think strong, good advice – except it's not just advice – that you only implement research-based teaching strategies and programs" (Stilwill, p. 4). Third, and lastly, Stilwill, clearly differentiating between Iowa school districts and school districts in other parts of the country, saw benefit in focusing on districts in other parts of the country who weren't doing what they should be doing for kids.

I've just not had the experience of working with a district – at least if you give it enough time – where people don't end up doing what's best for kids. Now, I understand that's not the case in every school district in the United States. I understand that there are school districts where the leadership isn't paying attention to kids that they need to do. But I think it will change... (Stilwill, p. 6)



Christensen also identified three benefits, but his descriptions are somewhat more complex because in discussing two of them, he tied the benefit to a problem he saw with NCLB. First, an unqualified benefit Christensen identified in NCLB – it disturbed the complacency that plagued efforts to improve in states who already had good educational systems, states like Nebraska and Iowa. As Christensen observed, "Good is the enemy of being better. 'Cause what's the motivation for it" (Christensen, p. 19)? And Christensen also saw NCLB's efforts to focus attention on children disadvantaged by poverty and/or color as an extremely positive component of NCLB. He described the problem in greater detail:

And I know you get in Iowa, and we do here – you try to have a conversation about what it's going to take to improve education and most of the conversations, at least over the last 20 years have been, "Well, what's wrong with what we're doing now? Seventy-five percent of the kids are getting it." Well, the point is, "Yeah, that's true, but twenty-five percent **aren't** getting it. And what about them? Because you wouldn't tolerate it if it was your own kid, or your grandkid – you wouldn't tolerate that." Now, those are somebody's kids. Well, happens to be in Nebraska, those kids are poor kids, those kids are Hispanic kids, those kids are black kids, and a lot of people don't care about those kids. That's not right. (Emphasis in original) (Christensen, pp. 18-19)

And now the discussion of benefits from Christensen's perspective becomes more complex – more complex because in each of the two following examples, he ties a benefit directly to a problem. For example, Christensen viewed as positives that NCLB embedded the ideas of equity, of judging schools on the basis of how all of its students do, and of having highly qualified teachers in its language. And yet... it is a bad law. When asked whether he viewed NCLB as a good law, Christensen responded:

No. No, it isn't. I mean, if you could take it on its face value for what it is trying to accomplish, the notion of equity is certainly a worthy goal, and the idea that we've got to judge performance of school districts on the basis of how all kids do, I mean, you can't argue with that. Should we have highly qualified teachers, should we have highly qualified paraprofessionals, should we have a growth model as an accountability measure – I mean,

that's all worthy, but it misses the point about this is coming from the farthest outside the system that it could possible come. I mean, it's coming from the wrong place. I don't care how hard you try, there will be nothing systemic about No Child Left Behind because it's coming from outside the system. No one regards the federal government as part of the education system. It is a support place ... (Christensen, p. 1)

Christensen did see an unadulterated benefit to No Child left behind – it legitimized projects that the Nebraska Department of Education had been wanting to do for some time. And yet, if given a choice, Christensen would just as soon pass on the opportunity to do those projects if it meant he didn't have to embrace the host of problems he saw in implementing the policies required by NCLB.

Now, on the other hand, you know, we have found some things that we're doing that we wanted to do for a long time that we're going to use the leverage of No Child Left Behind to get accomplished. We've never had a state data-based, student information data base, and we need one. Otherwise we're going to overwhelm our small school districts – even if we didn't have No Child Left Behind – with our own reporting system. It's just a huge burden.

The second thing is we're using it to force our federal programs people to get all together – we're going to have one application for all federal programs, one reporting mechanism – fiscal reporting mechanism, one final report. It's all going to be together, or those programs are going away. And we're doing that as well.

So, you know, those things have been positive for us. But, if I actually could pick between doing those and doing No Child Left Behind, didn't have to do it because of the other monies involved with No Child Left Behind, I'd kiss No Child Left Behind good-bye in a minute. Because I don't think it's worth what we're doing. (Christensen, pp. 8-9)

So, in Christensen's view, NCLB is a not-so-well-mixed bag containing a little good, a lot of bad. Stilwill, on the other hand, views NCLB as basically a first attempt that is flawed, but which will get better.

## **Summary**

The purpose of the chapter was to present factual and contextual information about the federal No Child Left Behind Act. I began by discussing the divergence of NCLB from the pattern of previous ESEA acts of Congress. The pattern shifted from supplemental targeted assistance to students-in-need with control of education vested in each of the several states to a scheme whereby the federal government dictated both educational policy and educational practices to the collective states that impacted all students, not just those deemed to be in need of supplemental assistance in reading and math. I next highlighted the federal requirements of NCLB on the states' public educational systems. Finally I concluded the chapter by presenting the views of two leaders of state educational systems towards the federal No Child Left Behind Act. Both Doug Christensen from Nebraska and Ted Stilwill from Iowa discussed NCLB in terms of three basic questions. First, why did NCLB happen? Second, what problems do you see with NCLB? Third, what benefits do you see with NCLB?

## Chapter 3

### The Constitutional Importance of Federalism

#### Introduction

After the U.S. Senate gave final congressional approval to NCLB in December 2001, a reporter for the New York Times described the act as "a breathtaking intrusion of the federal government on states' control of education" (Rothstein, 2001, p. D9). Surprisingly, few other writers or newspapers framed the issue around the central question of federalism as did the New York Times. Perhaps this can best be explained in terms of two different ideological positions, each side thinking it gained some benefit from NCLB.

Liberal Democrats have long wanted more federal involvement in education, hoping this would bring extra funds to urban schools. Conservative Republicans argued against a federal role, warning that it would lead to national curriculums that reflect liberal values.

When President Bush signed the education bill last week, liberals got their wish for federal involvement, though with less money than they wanted. Conservatives did not fret about increased federal control because they saw a chance to impose their own values on the nation's schools. (Rothstein, 2002, p. B10)

Only two professional educational organizations voiced concerns related to federalism about the federal government's greatly expanded role in education. Just prior to final congressional approval of NCLB, Bruce Hunter, Associate Executive Director of the American Association of School Administrators observed:

Somebody's going to have to explain to [school districts] that the people who give them 7% of the money have acquired a major voice in school evaluation and teacher qualifications. I don't think that's going to be an easy sell. (Anderson, p. A30)

After passage of the act and given some time to fully consider the implications of NCLB regarding public education, School Administrators of Iowa specifically raised the issue of federalism:

The absence of express authority in the United States Constitution for Congress to make laws relating to education, coupled with the Supreme Court's pronouncement in *Brown v. Board of Education* (1954) that "education is perhaps the most important function of state and local governments," mean that education is primarily, if not exclusively, a state responsibility. Principles of federalism and comity dictate that Congress' role in setting or controlling educational policy should be minimal. (School Administrators of Iowa, p. 1)

And so, the intersection of federalism and NCLB remained neatly ignored by the vast majority of writers, editors, state politicians, federal politicians, educators, state directors of education, and citizens. The lone exceptions were two professional educational organizations, School Administrators of Iowa and the American Association of School Administrators, and a New York Times reporter.

### **What Is Federalism?**

Federalism plays a central role in the American constitutional system of representative democracy. Constitutionally, federalism focuses on the distribution of powers between the federal government and the states. The Founding Fathers exhibited a realistic understanding about the dark side of human nature and the lure of power when they established our constitutional form of democratic government. As one renowned scholar noted, the Federalists' goal was to create a government that did not depend upon the virtue of its citizens.

Believing with Washington that virtue had 'in a great degree taken its departure from our land' and was not to be easily restored, the Federalists hoped to create an entirely new and original sort of republican government – a republic which did not require a virtuous people for its sustenance. If they could not, as they thought, really reform the character of American society, then they would somehow have to influence the operation of the society and moderate the effects of its viciousness. (Wood, 1968, 1998, p. 475)

Not having any illusions about a need to depend upon virtue for government sustenance, the Federalists also exhibited an awareness of the struggle between private interests and the public good. While societal life would go well when the two interests worked harmoniously, problems would arise when private interests worked against the public good. As one political analyst noted, the Constitution illustrated what could emerge when private and public interests coincided:

Few men in the history of mankind have espoused a view of the “common good” or “public interest” that militated against their private status; even Plato with all his reverence for disembodied reason managed to put philosophers on top of the pile. Thus it is not surprising that a number of diversified private interests joined to push the nationalist public interest; what would have been surprising was the absence of such a pragmatic united front. And the fact remains that, however motivated, these men did demonstrate a willingness to compromise their parochial interests in behalf of an ideal which took shape before their eyes and under their ministrations. (Roche, p. 801)

However, perpetual harmony between private and public interests was recognized as only a sometimes occurrence. Fully cognizant of the tendency throughout history for power to enlarge itself and for private interests to rise above the public good, the constitutional Framers:

- provided for separation of powers at the federal level with checks and balances; and
- embedded the principle of federalism through the Necessary and Proper Clause, the Guarantee Clause, the Supremacy Clause, and the Tenth Amendment.

Subsequent constitutional amendments related to federalism were added after the constitutional period, most notably the Eleventh and Fourteenth Amendments.

American federalism grew out of a compromise in the Constitutional Convention between those who wanted a strong central government and those who wanted independent sovereignty for the states. By dividing power between the state and federal levels, the Framers

sought to check abuses of governmental power at either level. The Framers communicated this unique development of American federalism to the public in *The Federalist Papers* prior to the state ratifying conventions. James Madison briefly summarized the task facing the Framers before linking the doctrines of “separation of powers” with “federalism” as the Convention’s approach to avoiding the danger of tyrannical concentrations of power. First, the task:

Ambition must be made to counteract ambition. ...If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. (Federalist No. 51, p. 290)

Next, the solution:

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. ...[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other – that the private interest of every individual may be a sentinel over the public rights.

...In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled itself. (Federalist No. 51, pp. 290-291)

Alexander Hamilton provided further clarification about the intent of federalism and its critical role in the proposed constitutional government:

Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress...

It may safely be received as an axiom in our political system that the State governments will, in all possible contingencies, afford complete security

against invasions of the public liberty by the national authority. (Federalist No. 28, p. 149)

As noted by Madison, “[T]he proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects” (Emphasis Madison) (Federalist No. 39, p. 213). A current constitutional scholar summarized federalism in the following manner:

[N]either the state nor the nation can be supreme, because both must be subordinated to the ultimate supremacy of the ultimate law – the Constitution itself. Both ... exist to promote, and must ultimately yield to, citizens’ rights that the Constitution creates or declares. Both sets of limited sovereigns must be kept within the limitations imposed on their sovereignty by the ultimate Sovereign – We the People of the United States who ordained and established those limitations. (Amar, 1994, p. 1232)

To help understand the seriousness with which the Framers viewed their newly created version of federalism, one needs only note that even the process of constitutional ratification was viewed as a federal decision, not a national one. According to Madison, “The act, therefore, establishing the Constitution will not be a *national* but a *federal* act” (Emphasis Madison) (Federalist No. 39, p. 211). Madison explained:

That it will be a federal and not a national act ... is obvious from this single consideration: that it is to result neither from the decision of a *majority* of the people of the Union, nor from that of a *majority* of the States. It must result from the *unanimous* assent of the several States that are parties to it... Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority, ...and the will of the majority must be determined either by a comparison of the individual votes, or by considering the will of the majority of the States as evidence of the will of a majority of the people of the United States. Neither of these rules has been adopted. Each State, in ratifying the Constitution is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *federal* and not a *national* constitution. (Emphasis Madison) (Federalist No. 39, pp. 211-212)



Not only was federalism embedded in the Constitution, not only was the ratification of the Constitution a federal process – the Constitution’s foundation was federal in nature. The federal foundation of the Constitution was again noted by Madison in an interesting explanation of the interweaving of federal and national principles in the newly proposed American government.

In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national. (Federalist No. 39, p. 214)

The interweaving of three political doctrines (federalism, the separation of powers, and judicial review) with the Constitution framing the resulting tapestry provided the key to resolving jurisdictional disputes between the national government and the state governments.

It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. (Federalist No. 39, pp. 213-214)

More than two hundred years have passed since the Constitution was carefully debated and formulated, extensively discussed and examined, and subsequently ratified by the state conventions. How has the Framers’ view of federalism held up over the years? Judging from their citations in subsequent Supreme Court rulings, in writings by Supreme Court justices, and in essays by constitutional scholars, the answer must be, “Quite well!” Witness Justice Frankfurter discussing the views of his respected colleague, Justice Oliver Wendell Holmes, on the issue of federalism:

When seen through the eyes of a Mr. Justice Holmes, there emerges from the Constitution the conception of a nation adequate to its national and international duties, consisting of federated states possessed of ample power for the diverse uses of a civilized people. He has been mindful of the Union

for which he fought; he has been equally watchful to assure scope for the states upon which the Union rests. (Frankfurter, p. 80)

Witness also one of Justice Frankfurter's own statements on the subject:

The states need the amplest scope for energy and individuality in dealing with the myriad problems created by our complex industrial civilization... Opportunity must be allowed for vindicating reasonable belief by experience. The very notion of our federalism calls for the free play of local diversity in dealing with local problems. (Frankfurter, pp. 48, 49)

In a similar vein, a noted constitutional scholar wrote, "A centralized regime of one-size-fits-all national uniformity denies federalism's rich diversity and its corresponding possibilities for citizen choice and self-selection" (Amar, 1994, p. 1237). And, writing for the Court majority in *Atascadero State Hospital v. Scanlon*, Justice Powell noted, "The Framers believed that the states played a vital role in our system and that strong state governments were essential to serve as a counterpoise to the power of the Federal Government" (473 U.S. 234, 240). In a dissent written the same year as *Atascadero*, Powell reiterated the same theme. "It is at ... state and local levels – not in Washington as the Court so mistakenly thinks – that 'democratic self-government' is best exemplified" (*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 577). In a later majority opinion, Justice O'Connor extensively quoted the writings of Madison and Hamilton regarding federalism and summarized many of the advantages of federalism. In her summary of federalism's advantages, Justice O'Connor observed:

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry...

Perhaps the principal benefit of the federalist system is a check on abuses of government power... Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the

accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. Alexander Hamilton explained to the people of New York, perhaps optimistically, that the new federalist system would suppress completely “the attempts of the government to establish a tyranny”... (*Gregory v. Ashcroft*, 501 U.S. 452, 458-459)

Finally, using a metaphor derived from 20th century physics, Justice Kennedy both summarized and noted the uniqueness of American federalism. Originally appearing in a concurring opinion, Justice Kennedy’s characterization of federalism was subsequently cited in several majority Court opinions as well as in a dissenting opinion representing the short end of a 5-4 Supreme Court decision. As Justice Kennedy astutely stated in a concurring opinion in *U.S. Term Limits v. Thornton*:

Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution ... establish[ed] two orders of government, each with its own direct relationship, ... its own set of mutual rights and obligations to the people who sustain it and are governed by it. (514 U.S. 779, 841-842)

Kennedy’s metaphor for federalism was subsequently cited in *Saenz v. Roe*, 526 U.S. 489, 504, n. 17 (1999); *Alden v. Maine*, 527 U.S. 706, 751 (1999); *Bush v. Gore*, 531 U.S. 98, 142-143, text and n. 3 (2000) (Ginsburg, Stevens, Souter & Breyer, dissenting).

### **The Intersection of Federalism and NCLB**

Through federalism the Framers intended for the state and federal governments to serve as checks and counterbalances to tyrannical concentrations of power at either level. This issue, the balance of power between state and federal governments as mediated by the constitutional case law of federalism, lies at the heart of concerns raised by passage of the No Child Left Behind Act and its effects upon "local control" in Iowa and other states. NCLB abolishes local control in terms of district goals for student achievement. Portions of this act raise constitutional issues as

they relate to the Guarantee Clause, the Tenth Amendment, the Eleventh Amendment, and the Fourteenth Amendment of the Constitution. The problems primarily center on the federal requirements for state action and the requirements that impact all students, not just those deemed to be in need of supplemental assistance. The issue is not whether these requirements constitute sound educational policy. The issue centers on the question, "Who possesses legitimate authority to determine educational policy under our system of constitutional government?"

### **The Constitutional Components of Federalism**

While contained in one location (the Constitution and its amendments), the provisions governing the distribution of power between the various state governments and the federal government are sprinkled throughout the document and are to be found either in constitutional clauses receiving their name from subsequent Supreme Court case law or are located within several of the constitutional amendments. The components of federalism are identified and briefly discussed in this section.

#### **The guarantee clause.**

Found in Article IV, Section 4 of the Constitution, the Guarantee Clause declares that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."

What exactly does this mean? The most obvious meaning is that the U.S. promises to guarantee each of the 50 states the autonomy necessary to maintain a republican form of government. It also means that the federal government should not infringe on the ability of state governments to reflect and enact the core values of republican government. The Supreme Court and commentators on federalism use the term "local control" to refer to governments at the state, county, and municipal levels.

The Guarantee Clause suggests a limit on the power of the federal government to infringe on the powers of state governments. Interestingly, each of the constitutions of the fifty states specifically mentions public education as a function of state government. The Guarantee Clause recognizes that citizens of a state cannot enact their own laws if their government is beholden to Washington. It recognizes that for governments to be republican, they must have something purposeful to enact which is meaningful to citizens at the state level. Simply put, a federal intrusion into a state's control of its system of public education impairs the republican government guaranteed each of the states.

### **The tenth amendment.**

Very simply, the Tenth Amendment declares that "Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States."

Education is not mentioned in the U.S. Constitution. Historically, as a matter of public policy, control of public education has been left to the various state governments. That, of course, was the lay of the land before NCLB. The Tenth Amendment reinforces the necessity of enforcing the federalism principle located in the Guarantee Clause. The structure of government created by the Constitution, obviously a federal system, clearly illustrates the importance of interpreting both the Guarantee Clause and the Tenth Amendments as joint restraints on federal power.

Use of the Spending Clause by the federal government to increase the scope of congressional authority is a 20th century development in Tenth Amendment/Commerce Clause jurisprudence whereby Congress began attaching requirements of state action in order to access federal funds. It derives its authority from Article I, Section 8, Clause 1, which states that Congress "shall have the power to...provide for the...general welfare of the United States."

Currently, in order to successfully attach conditions of state action to receipt of federal funds, Congress must abide by conditions spelled out by the U.S. Supreme Court in *South Dakota v. Dole*, 483 U.S. 203 (1987). *Dole* was a case in which South Dakota unsuccessfully challenged the constitutionality of federal requirements to adopt a minimum drinking age of 21 in order to access federal highway funds. Elizabeth Dole, as Secretary of the Department of Transportation, was named the defendant. The conditions laid out by the Court in *Dole* are:

1. the exercise of the spending power must be in pursuit of "the general welfare."
2. any condition(s) attached to the receipt of federal funds must be clearly stated in order to allow the States to exercise their choice knowingly.
3. the conditions must be related to the federal interest in particular national projects or programs.
4. the condition must not require states to act in an unconstitutional manner.
5. the financial inducement must not be so coercive as to pass the point at which pressure turns into compulsion.

The problems arise under items 4 and 5. With regards to item 4 above, NCLB requires the states to act as an enforcement agent for federal law. Supreme Court rulings have consistently held this to be a violation. Thus the law requires states to act in an unconstitutional manner. Regarding item 5 above, the dire financial condition of schools in Iowa over the past three years could conceivably qualify as the point at which the loss of any funding becomes coercive. Increases in funding have not kept pace with the increases in operating costs for Iowa schools. Across-the-board cuts in state aid for two of the past three years exacerbated the financial problems of Iowa schools. Some basic facts illustrate the problem:<sup>11</sup>

- Iowa's schools received an average of 1.17% allowable growth in the three fiscal years (FY 2002, FY 2003, FY 2004) following passage of NCLB.
- Negotiated settlements with teachers for the same time period averaged 3-4 % annually.
- Health insurance costs increased from 15-48% annually over the same time period.
- For the 2003-2004 school year, 231 of 370 public school districts in Iowa were on the budget guarantee, a mechanism that permits districts to avoid revenue reductions at the penalty of zero revenue growth. For the 2004-2005 school year, the number of public school districts on the budget guarantee has increased to 242.

Other states' budgets have also experienced declining revenues resulting in reduced levels of funding for their public schools. Thus the loss of funding from the federal government could well represent coercion in states other than Iowa as well.

#### **The eleventh amendment.**

This amendment states that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States..." In lay terms, this amendment serves to restrict lawsuits against individual states.

The constitutional issue here does not arise until the federal government withholds funds from a school or a state because of NCLB. The argument here would center on the fact that the NCLB enforcement mechanism would in effect constitute a lawsuit against one of the states or against one of its agencies, i.e., a local education agency.

#### **The fourteenth amendment.**

Two clauses of Section 1 of the Fourteenth Amendment could pertain to the NCLB Act. What is known as the Due Process Clause reads, "...nor shall any State deprive any person of

life, liberty, or property, without due process of law; ...” The Equal Protection Clause portion of the Fourteenth Amendment immediately follows the Due Process Clause and declares, “...nor deny to any person within its jurisdiction the equal protection of the laws. The Fourteenth Amendment could contradict the constitutionality of NCLB in two ways. First, if funds are withheld from a school or are re-directed away from the instructional component because of the low performance of a particular subgroup, then other groups are negatively impacted with a loss of instructional funds without receiving either due process or the equal protection of the law. Their performances are ok, but still funds are withdrawn from their school or are re-directed to non-instructional components.

The other argument comes into play when considering the various subgroups constructed by NCLB and how they are assessed. First, the original sub-group’s aggregate assessment performance is not compared against its own performance at other educational stages, either prior or subsequent to the assessment results being examined. Each year a new sub-group is created and their performance is measured against that of either a previous or future sub-group. For example, the performance of one racial group of fourth-graders is compared not against their own prior or subsequent performance to determine growth. Instead the performance of one racial group of fourth-graders is compared against the performance of an entirely new group of fourth-graders of the same racial heritage. It would be argued that such a system fails the "rational basis" test. In creating groups based on race or gender, there must be a legitimate reason or a rational basis for doing so. In this case, there is no clear rational basis for forming such groups. In fact, it could be argued that it is not even a rational practice. If, on the other hand, the same group was followed over time and assessed against their prior performances as a group in order to determine whether the standard of adequate progress had been made, such



might pass the rational basis test. It is doubtful that the current law does indeed have a rational basis.

Clearing the rational basis hurdle, however, is only the first barrier to be overcome in order to pass constitutional muster. Usually the courts defer to the legislature if a rational basis can be shown. If a law involves a “suspect” class such as gender or race, however, the Supreme Court has ruled that the government’s action must pass a much higher test – the government must prove a “compelling interest” exists in order to treat people differently. This is a more difficult test. Since education has not been viewed by the U.S. Supreme Court as a fundamental right, it is not readily apparent, nor has it been articulated, that a compelling interest exists to justify NCLB’s treatment of “suspect” classes.

A knowledgeable and astute reader might object that this is irrelevant, that the Fourteenth Amendment prohibits state governments, not the federal government, from violating due process rights and from denying any citizens the equal protection of its laws. Since the No Child Left Behind Act is federal, not state, law, these Fourteenth Amendment arguments are specious. However, this objection would not be valid. The Supreme Court has ruled that the Due Process Clause of the Fifth Amendment acts to restrain federal action in the same way that the Equal Protection Clause of the Fourteenth Amendment restricts the states. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

### **NCLB As a Policy Approach and Federalism**

The prescriptive approach of NCLB runs counter to Iowa's educational practice of local control as well as the educational practices of other states. Rather than reflecting policy and leaving the implementation details to the local level, NCLB is highly prescriptive in detailing what each state will do. In a front-page headline, the *St. Louis Post-Dispatch* identified local

control as an issue raised by the passage of NCLB and observed that “educators are leery of the federal government telling local districts what to do” (Pierce & Bower, p. A1). The story quoted an official with the Missouri School Board Association: “It seems in a broad sense to represent a significant shift in authority over public education from the state and local level to the federal level” (Pierce & Bower, p. A1). The prescriptive approach of NCLB is thus viewed as going beyond current understandings of the federal government's role regarding both educational policy and educational practice. According to Nebraska Commissioner of Education Doug Christensen, as quoted in *The Baltimore Sun*,

The Constitution of this country says education is a state matter, that it's our job, and I cannot in good conscience stand up in front of anyone in this state and say we need to do something because the federal government says we do. (Greene, ¶ 12)

As the article also noted, state officials opposed the thrust of NCLB to ignore the “principle that the federal government should not meddle in state-run public education” (Greene, ¶ 9). For this reason, Nebraska Republican senator, Chuck Hagel, voted against NCLB (Greene, ¶ 8).

NCLB also represents a change in students targeted for help by federal aid. Whereas in the past, ESEA legislation focused on just the students targeted for educational assistance with federal funds, this ESEA action focuses on all students. Whether or not the law passes constitutional muster regarding federalism remains a vitally important question that this dissertation will address.

## **Summary**

This chapter began by noting the sparsity of concerns about the fit between federalism and the No Child Left Behind Act. The concept of federalism was then explained and discussed in terms of possible intersections between it and NCLB. Next the specific constitutional components of federalism were identified and explained. The components of federalism

identified as being contained within either the text of the original Constitution or its subsequent amendments included the Guarantee Clause, the Tenth Amendment, the Eleventh Amendment, the Fourteenth Amendment, and the Spending Clause. Because so few concerns were publicly expressed about NCLB meeting the constitutional requirements of federalism, the next chapter will explore the importance of federalism to the No Child Left Behind Act. After discussing the contextual importance of federalism, the major question about NCLB's constitutionality will be fully addressed in the remaining sections and will constitute the bulk of this work.

## Chapter 4

### The Procedural Importance of Federalism As a Public Policy Approach

#### Introduction

The approach used by the No Child Left Behind Act towards achievement gaps ignores the shortcomings of other systems impacting the well-being of children in American society. From birth until age eighteen, children spend slightly more than 8% of their total life in the classroom (see Appendix G). Yet NCLB places responsibility for the success or failure of children to learn solely on the educational system and ignores the systems impacting the remaining 92% of children's lives during the formative and emerging periods of their lives.

The failure to systemically address the multiple systems bearing on the well-being of American children has several consequences. First, success in achieving the goal of NCLB will be limited as other systems impacting child welfare will not be addressed in any major fashion. As Senge observed, “[V]ision without systems thinking ends up painting lovely pictures of the future with no deep understanding of the forces that must be mastered to move from here to there” (Senge, p. 12). He continued, “Without systems thinking, the seed of vision falls on harsh soil” (Senge, p. 12). Without the vision provided by systems thinking, the policies of NCLB may well create future problems. According to Senge:

[T]he causes of many pressing issues, from urban decay to global ecological threat, lay in the very well-intentioned policies designed to alleviate them. These problems were “actually systems” that lured policymakers into interventions that focused on obvious symptoms not underlying causes, which produced short-term benefit but long-term malaise, and fostered the need for still more symptomatic interventions. (Senge, pp. 14-15)

Second, and more important, by not recognizing the important role of other systems, we will not be making the fundamental changes that need to occur in order for America to be

recognized as a society that places primary value upon the nation's children. NCLB does not see the whole (children's well-being) because of its fixation on a part (what happens in the classroom). As one analyst noted, "We are conditioned to see life as a series of events, and for every event, we think there is one obvious cause."

Focusing on events lead to "event" explanations... Such explanations may be true as far as they go, but they distract us from seeing the longer-term patterns of change that lie behind the events and from understanding the causes of those patterns. (Senge, p. 21)

NCLB focuses on the event of "non-learning" which it defines as a score on a single exam that falls below an arbitrary criterion. According to Senge, this is typical of efforts to apply linear thinking to complex non-linear situations by not viewing it holistically.

Most of us have had a lifetime of training in breaking complex problems apart, in focusing on the part we know best, and in "fixing" problem symptoms, usually with little understanding of deeper causes. It is hard for us to see the limits of ways of thinking that are so ingrained. (Senge, p. xix)

We need, therefore, to destroy "the illusion that the world is created of separate, unrelated forces" (Senge, p. 3).

Third, we will be delaying the start of the adaptive work that needs to occur in order for us to realize the promise of America. As Senge noted, "Learning that changes mental models is immensely challenging. It is disorienting. It can be frightening as we confront cherished beliefs and assumptions" (Senge, p. xv). Yet, adaptive work requires us to adjust what is challenging if we are to change the current system of children's well-being in America to better meet the needs of children and their families.

[O]ur organizations work the way they work, ultimately, because of *how we think and how we interact*. Only by changing how we think can we change deeply embedded policies and practices. Only by changing how we interact can shared visions, shared understandings, and new capacities for coordinated action be established. (Senge, p. xiv)

This chapter will establish the contextual importance of using federalism as a tool by which systems thinking and adaptive work can be forged together to accomplish the goal of the No Child Left Behind Act. It will be shown that the current version of NCLB represents a short-sighted and ill-conceived attempt to apply a technical fix to a larger systemic problem, the well-being of children in America. It will further be shown that NCLB does not recognize the nature of the adaptive work that needs to occur in order to realize the vision of ensuring that no children get left behind. Finally, it will be argued that such a recognition needs to be harnessed to systems thinking through federalism.

## **A Systems Viewpoint of NCLB**

### **Introduction.**

Since the agenda of proficiency for all encompasses the entire system of public education in this country, it is fair to ask, “How does NCLB fare when viewed through the lens of a systems perspective?” An initial attempt to answer this question will be posed from the organizational framework provided by Peter Senge in *The Fifth Discipline*. Senge proposed five disciplines as forming the core of an approach to systems analysis. These disciplines include mental models, personal mastery, shared vision, team learning, and systems thinking. According to Senge, systems thinking is “a discipline of seeing wholes. It is a framework for seeing interrelationships rather than things, for seeing patterns of change rather than static ‘snapshots’” (Senge, p. 68). Senge believed that we need to destroy “the illusion that the world is created of separate, unrelated forces” (Senge, p. 3). He further outlined his thinking:

I call systems thinking the fifth discipline because it is the conceptual cornerstone that underlies all of the five learning disciplines... All are concerned with a shift of mind from seeing parts to seeing wholes, from seeing people as helpless reactors to seeing them as active participants in shaping their reality, from reacting to the present to creating the future. (Senge, p. 69)

For Senge, the “essence” of systems thinking lay in a “shift of mind: seeing interrelationships rather than linear cause-effect chains, and seeing processes of change rather than snapshots” (Senge, p. 73). He continued, “Eventually, systems thinking forms a rich language for describing a vast array of interrelationships and patterns of change” (Senge, p. 73).

Senge’s model thus provides a framework for examining NCLB from a systems perspective according to each of the five disciplines. Strengths and problems will be diagnosed in terms of their congruence (or lack thereof) between a particular discipline and the No Child Left Behind Act. Any problems emerging from this analysis will be defined, described, and discussed within the context of particular disciplines. Finally, some systems-based solutions will be offered to remediate any systemic deficiencies of NCLB.

### **Mental model.**

What is the “mental model” of NCLB? What beliefs and values drive its provisions? The philosophical underpinnings are not directly identified in the act. However, many of its provisions are grounded in philosophical realism as discussed by Ozmon & Craver (1999), most notably the following beliefs and assumptions: 1) viewing education as an enterprise that provides students with “basic and essential knowledge,” most notably in reading, writing, math, science, and history (Ozmon & Craver, pp. 69, 71-73, 79); 2) believing that knowledge exists and can be measured (Ozmon & Craver, p. 81); 3) requiring students to measure up to objective standards (Ozmon & Craver, pp. 72, 81); 4) using tests to evaluate “teacher effectiveness and student performance” (Ozmon & Craver, p. 82); and 5) making higher standards for teachers (Ozmon & Craver, pp. 72, 82).

One provision of NCLB, however, appears to be grounded in philosophical idealism – all children will be proficient in reading, math, and science. This doesn’t exist anywhere in current

reality in any society in the world, so it doesn't derive from realism. Its only existence in today's world is in the realm of ideas, as a possibility underlying reality that can't be seen, but can only be inferred in similar fashion to Plato's analogy of the cave (Cornford, pp. 227-235). Just as the perfect person or the perfect government exists only in our imagination, but not in reality, neither does the perfect educational system exist that is capable of ensuring that everyone is an expert reader, mathematician, and scientist, no matter what differences in mental ability each brings to the endeavor, no matter what negative social forces are impacting each young person's life. Or, as the president of the California Teachers Association observed, "You could require every teacher to run the 100 in 9-flat, but that doesn't mean it's going to happen" (Coile, p. A1).

Evidently one or more of the authors of NCLB stumbled into the sunlight and captured a glimpse of the reality lurking beyond our material world, but a number of educators, including two state directors of education, have some problems believing that ALL children can achieve proficiency under either the current system or the one proposed by NCLB (see Christensen, p. 9 and Stilwill, 2003, May 14, p. 2). Howard Butters, superintendent of Manhattan School District 114 in Illinois, illustrated the problem with the idea of all children achieving proficiency in a *Chicago Tribune* article. Mr. Butters observed:

For students to receive special education services, they have to at least be performing two years below grade level. And then to expect that those children are going to be able to perform on the state's assessment at grade level, I just find that ludicrous. (Banchero & Little, p. 9)

Motivationally, NCLB assumes a draconian approach – the system will only improve, first, through top-down action imposed from outside the system, and second, by imposing sanctions and penalties for failure to achieve the legislation's purpose. The "top-down action coming from outside the system" aspect of NCLB has drawn criticism from public education officials. Chicago Public Schools chief Arne Duncan criticized NCLB in this manner:



It infuriates me when bureaucrats in Washington make laws and set rules that makes no sense and, in the end, harm kids. The way this law is being implemented creates disincentives and discourages those who are trying to do the right thing. It is wrong morally and intellectually, and it harms public education. (Banchero & Little, p. 9)

Reporters for the *Chicago Tribune* summarized the sanctions and penalties facing schools that fail to meet the legislation's purpose:

The law lays out a series of escalating sanctions for schools that fail to measure up, beginning with a requirement that they allow students to transfer to better schools and ending with possible closure.

A district that fails to meet standards two years in a row must create an improvement plan laying out how the district will fix the problems that led to the student failure... Most troubling to some sub-par districts, however, is the provision that bars them from overseeing tutoring programs in failing schools. (Banchero & Little, p. 9)

How does this mental model square with research? Ironically, in some respects, not too well. It is ironic because while NCLB requires schools to implement practices which have a clear, scientific research base, some provisions of the law don't measure up to that requirement. This is most evident in the research regarding intrinsic/extrinsic motivation and its effects upon learning as well as the research regarding the purpose of learning as being either growth or measuring up to a fixed external standard. One could make an entire list of research bases whose effects on learning are either violated or ignored by NCLB. These include, but are not limited to, multiple intelligences, positive reinforcement versus punishment, multiple causation, and the effects of low socioeconomic status on learning.

First, what is the incongruence between NCLB's mental model and the research about motivation and learning? Extrinsic motivational procedures and external standards, both featured prominently in NCLB, negatively effect learning, at least according to research conducted by Ames & Archer (1988), Amrein & Berliner (2002), Deci, Spiegel, Ryan, Koestner,

& Kauffman (1982), Elliott & Dweck (1988), Flink, Boggiano, & Barrett (1990), Grolnick & Ryan (1987), Maehr & Stallings (1972), Mueller & Dweck (1998), and Utman (1997). This research built on the initial work of Deci & Ryan at the University of Rochester who had postulated a need for autonomy or self-determination as a descriptor of intrinsic motivation. They contrasted intrinsic motivation [individuals focus on learning and mastering task skills] with extrinsic motivation [individuals are pressured by external forces and feel compelled to focus on demonstrating ability and worth]. According to Deci and Ryan, intrinsically motivated persons are willing to try and stretch their abilities beyond their present capabilities. Furthermore, they derive pleasure from attempting to meet such a challenge. Deci and Ryan believed that intrinsic motivation fostered creativity, spontaneity, and flexibility in problem solving. They contrasted intrinsic with extrinsic motivation in which individuals are motivated by factors external to a particular task, e.g., rewards, goals set by others, evaluations of individual performance, etc. Being compelled to achieve by external forces, according to Deci and Ryan, promoted increased feelings of pressure in individuals and fostered low levels of creative, spontaneous, and flexible behavior. Extrinsic motivation would also act to undermine any intrinsic motivation that people possessed prior to the onset of extrinsic motivation as a prime factor in behavior. Subsequent research confirmed that:

- when external rewards or other strategies designed to control behavior are used,
  - behavior is no longer viewed as self-determined.
  - a person's interest in pursuing that activity in her or his free time declines.

- even when the reason for doing an activity is internally motivated, self-determination decreases and motivation is impaired by the use of controlling forces.
- creativity and overall achievement are impaired by controlling forces, i.e., “students experience(ing) controlling behaviors used by others to achieve a given standard” (Flink, Boggiano, & Barrett, p. 916).

To summarize, incongruence appears to exist between NCLB’s mental model and the research regarding extrinsic/intrinsic motivation, particularly as such motivation impacts learning.

The realist’s idea of knowledge as existing independently of the learner, another assumption of NCLB grounded in philosophical realism as discussed previously, is challenged directly by the qualitative research of developmentalists Vygotsky, Piaget, Clay, and Goodman (see reference list for their works) who see knowledge as being constructed and developed by learners through their interactions with the world around them. The idea of construction of literacy by student learners is a prominent feature of their work which can also be seen from some of the titles – “How Children Construct Literacy,” “Becoming Literate: The Construction of Inner Control,” and “The Construction of Reality in the Child” (Goodman, 1986; Clay, 1991; Piaget, 1954). By contrast, NCLB views learning as a quantifiable set of facts that can be taught, learned, mastered, and assessed by a single exam. A single score obtained at a specific date in time defines learning and determines success or failure, both for each student and her/his own school.

To sum up the mental model of NCLB, it possesses internal inconsistencies between realism and idealism. It also conflicts with research regarding motivation and purpose for learning. NCLB’s mental model of knowledge also clashes with developmental theories as well as a significant

body of qualitative research conducted by Vygotsky, Piaget, Clay, and Goodman focusing upon how children actually learn. Finally, the mental model of NCLB focuses on compliance, not on collaboration or upon mutual partnerships.

### **Personal mastery.**

How does NCLB fare from the perspective of personal mastery? According to Senge's definition, it is only a partial mesh. NCLB interprets mastery literally, focusing almost exclusively upon students' competence and skills, especially skills and competencies associated with reading, math, and science. Mastery is defined as performance on a single exam. NCLB also applies the same literal focus regarding teacher competencies and skills. Yet, Senge cautioned that

[p]ersonal mastery goes beyond competence and skills, though it is grounded in competence and skills. It goes beyond spiritual unfolding or opening, although it requires spiritual growth. It means approaching one's life as a creative work, living life from a creative as opposed to reactive viewpoint. (Senge, p. 141)

Senge discussed the views of a successful businessperson, Kazuo Inamori, regarding personal mastery. According to Senge, Inamori observed that the active force of any enterprise or endeavor was "people. And people have their own will, their own mind, and their own way of thinking" (Senge, p. 139). As presented by Senge, Inamori's concept of personal mastery from a leadership point of view involves "tapping the potential of people" (Senge, p. 140). Such personal mastery "will require new understanding of the 'subconscious mind,' 'willpower,' and 'action of the heart ... sincere desire to serve the world'" (Senge, p. 140). I haven't read, either in the legislation or in any of the reports about NCLB, anything related to Inamori's conception. So, it would appear that from a personal mastery standpoint, NCLB at best only meets about half of the criteria and at worst, a much smaller amount.

### **Shared vision.**

What about shared vision? With its unilateral imposition of penalties, sanctions, and targets, NCLB in effect has announced that their voice is, and shall be, the only one that matters. To avoid the penalties and negative sanctions of NCLB, state systems of public education need to adopt NCLB's mental model, inconsistencies and conflicts with research notwithstanding. To assume that such an approach represents a shared vision stretches credulity. If by shared, one means a vision that is developed mutually, then there is no shared vision. If by shared vision, one refers to the governmental concept of federalism regarding how power is distributed and shared between the federal and state levels, NCLB also falls short (see Christensen, pp. 1-2, 15-17 and Stilwill, 2003, May 14, pp. 1, 9-10). According to Senge, "Shared visions emerge from personal visions. This is how they derive their energy and how they foster commitment" (Senge, p. 211). Furthermore, in Senge's view, "Organizations intent on building shared visions continually encourage members to develop their personal visions" (Senge, p. 211). This does not appear to be the intent of NCLB. Finally, building shared visions requires organizations and governments "to give up traditional notions that visions are always announced from 'on high'" (Senge, p. 213). Few, if any, think that NCLB represents the federal government's intent to give up such a traditional notion. All of the evidence suggests that NCLB is not about sharing, but about complying. Both Commissioner Doug Christensen in Nebraska and recently retired Director Ted Stilwill in Iowa share that viewpoint. Referring to the No Child Left Behind Act, Dr. Christensen noted:

It does nothing to foster leadership. It creates an environment that I think is just absolutely contrary to (fostering leadership) in that it's a compliance environment. It's compliance with the rules, it's test-bound, which is – you know, I believe that assessment is a very valuable piece of learning how to teach and teach well and (for) improving teaching, but this isn't about

assessment; this is about testing. And testing becomes a compliance document. (Christensen, p. 21)

Noting that Iowa's educational system provided evidence that pride and local control were effective in promoting change, Director Stilwill observed that policy makers "have to move beyond what's almost an exclusive emphasis on accountability as a mechanism to increase productivity." He continued:

If there's a flaw in our thinking at the moment nationally, it's that simply tightening up on accountability – and it's sometimes described as creating a situation where, you know, shame and fear drive the agenda – I think we know, we have ample evidence from work at both the public and private sector, that those are short-term strategies. (Stilwill, 2003, May 14, pp. 5-6)

Since sharing and compliance are such different concepts in terms of mutuality between partners, I don't believe NCLB currently involves developing a shared vision within the context presented by Senge.

### **Team learning.**

Because NCLB's basic orientation focuses upon compliance and because it raises concerns about violations of federalism, the No Child Left Behind Act also comes up short with regards to team learning. There can be little idea of a team concept when pronouncements are announced from "on high" with no input from either state educational leaders or from educators at any level. With respect to NCLB, shared visions and team learning are intertwined with each other. The issues underlying shared vision and team learning raise ethical concerns about both how and why the law was written. A report in the *New York Times* described the NCLB bill as having been "written largely by the White House" (Rothstein, 2001, p. D9). One of the chief architects of NCLB, Margaret Spellings, first served as the political director of Bush's 1994 campaign for governor of Texas before being subsequently elevated, first, to chief educational advisor for Texas Governor Bush, then to Chief Domestic Policy Advisor to President Bush, and

finally, nominated by President Bush to replace Rod Paige as Secretary of Education.<sup>12</sup>

According to both Christensen and Stilwill, NCLB was written behind closed doors without input from the states or from educators.<sup>13</sup> NCLB was such a closely guarded secret that legislators voted on it without knowing the particulars. According to the Nebraska Commissioner of Education:

So they voted for it, assuming that certainly, how could it be doing any harm, the idea of No Child Left Behind, the idea of more money, the idea of flexibility. And so they adopted all the buzzwords, and I don't think probably you could find on one hand the number of people who actually read the twelve hundred pages of the bill. And it was written behind a closed door. Nobody found out. Until it hit the floor, our Senators and Congressmen could not find out what was the content of the legislation. Because it was done behind closed doors, and they wouldn't tell anybody. (Christensen, pp. 4-5)

Ted Stilwill, Iowa Director of Education during the time NCLB was passed and initially implemented, also noted that the Iowa congressional delegation didn't understand what they were voting on or how the law would "play out" when they approved NCLB.

[T]hey didn't realize it was going to have this kind of an impact on Iowa, they thought, because of Iowa's lead position perhaps much of this law might not apply. And I know that that happens... They have to make a lot of assumptions that other people have done that kind of homework. (Stilwill, 2003, May 14, pp. 1-2)

And when the text was made available after the voting had taken place, its sheer massiveness (more than 1,200 pages) prevented either an immediate or clear understanding. Then there was the intent on the part of some legislators to use NCLB as a means to discredit public education in order to pave the way for vouchers for private schools. Christensen noted that "you can't have a conversation about alternatives to public education until you can prove that public education isn't working" (Janson, 2003, p. 5). In characterizing the intent of NCLB, Christensen stated:

[T]his is not about improving public education. This is about embarrassing public education, so that we can have a conversation about choice and

vouchers and charter schools. Because if it was about improving public education, we wouldn't do it this way. Nobody would. I mean even the staunchest Republicans would not do it this way. (Janson, 2003, pp. 5-6)

Christensen's premonition about NCLB appeared to be coming to fruition earlier than anticipated. As Christensen viewed NCLB, "[I]t sets schools up [because] at some point, virtually every school is going to hit the wall, like running a marathon" (Christensen, p. 15). According to the *Chicago Tribune*, "In Illinois, nearly 60 percent of districts either have run afoul of the law or have a school that has done so" (Banchero & Little, p. 9). As of November 12, 2004, approximately 51% of the state's districts faced sanctions unless test scores improved.

A Tribune analysis of the state data shows that the biggest stumbling block for districts was the performance of special education students. Of the 400 districts that had enough special education students to total a subgroup, nearly three-quarters of them failed to meet the state testing standards in special education reading. (Banchero & Little, p. 9)

The catch was that the schools being labeled included schools that enjoy a positive reputation for educational excellence, schools like New Trier, Lake Forest, Hinsdale, and Franklin Park, all western suburbs of Chicago. According to the *Chicago Tribune*,

By most measure, Franklin Park School District 84 in west suburban Cook County is a success.

Roughly 70 percent of its students passed state achievement exams last year. All four of its schools met – and in most cases overwhelmingly surpassed – the testing standards of the federal No Child Left Behind Act. Its class sizes are smaller than average.

But the 1,300-pupil system suddenly finds itself in a peculiar and unenviable position, labeled as a troubled district by the federal government...

The story is much the same across the nation, where some of the best-regarded school districts are being tripped up by nuances of the complicated and controversial federal education reform. Their inclusion on the list of troubled districts is inflaming the debate already raging over the law, which some educators and lawmakers argue is deeply flawed and focuses too much on testing. (Banchero & Little, pp. 1,9)



As mentioned earlier, it is not certain that Christensen thought his premonition would play out as quickly as seemed to be the case in November of 2004, barely into the third year of implementation.

Stilwill also observed that some of the legislators' votes in favor of NCLB occurred because the individuals were "not terribly strong advocates of public schools." These legislators, according to Stilwill, "viewed public education as monopolistic and as part of the problem, not part of the solution" (Janson, 2003, p. 7). The public interest was ignored in favor of private interests on the part of some legislators. Such actions did not constitute "good work" as defined by Gardner, Csikszentmihalyi, & Damon (2001) in *Good Work: When Excellence and Ethics Meet*. According to the authors, good work results from "melding expertise with moral distinction" (Gardner, Csikszentmihalyi, & Damon, p. viii). With legislators voting for legislation in hopes of discrediting public education so that private schools could receive public funds through vouchers and charter-school programs, "good work" clearly did not happen with the passage of NCLB. The hope of diverting money away from public education to benefit private schools and their clientele could be characterized as a reverse "Robin Hood" attempt to redistribute wealth, only this time benefiting those who are already economically comfortable. This writer does not believe that undercutting public education for private gain is ethical or that such attempts constitute "good work."

Punishment damages the concept embodied by team learning and shared responsibility. As both Christensen and Stilwill noted, shaming and sanctions have a poor track record in their states regarding systematic change). The renowned psychologist, B.F. Skinner, also noted the ineffectiveness of punishment. According to Skinner, punishment was less effective than positive reinforcement in changing behavior because it: caused the individual to "avoid being

punished” rather than changing the behavior; caused “slower and less learned responses”; trained an individual about “what not to do,” but didn’t train them regarding “what to do”; and it caused a person to “associate the punishment with the punisher” and not the behavior to be abolished or to be modified (Benson, pp. 80-81). Perhaps the problem is more than NCLB being grounded in a negative portion of operant conditioning. Perhaps the problem is that NCLB is grounded in operant conditioning in the first place. Instead of focusing on punishment or reward, perhaps the focus should be on what is needed to improve educational opportunities for all children. The idea that such an approach might be tried appears to be developing currently in Ireland where the government is providing additional funds to purchase books in poverty-stricken schools, is developing a plan to tackle disadvantage which would include providing incentives for high-performing teachers to teach in high-poverty areas, and is opposed to shaming schools by making a public listing of schools that have lower performing students because of higher poverty levels (Flynn, p. 7).

### **Systems thinking.**

How does NCLB fare when examined from a systems thinking perspective? With regards to federalism as part of the system of American government, not too well. NCLB raises constitutional concerns about violations of federalism as defined by the Constitution and developed through case law. Specifically, these concerns focus upon the Guarantee Clause, the intersection of Tenth Amendment & the Spending Clause, the Eleventh Amendment, and the Fourteenth Amendment of the U.S. Constitution.

From a systems perspective which views education as interacting with and dependent upon other systems such as families, childcare, and preschool, NCLB doesn’t fare too well once again. The approach used by the No Child Left Behind Act towards achievement gaps ignores

the shortcomings of other systems impacting the well-being of children in American society. From birth through age eighteen, children spend approximately 8% of their total life in an instructional setting (see Appendix G). Yet NCLB places responsibility for the success or failure of children to learn solely on the educational system and ignores the systems impacting the remaining 92% of children's lives during the formative and emerging periods of their lives. The failure to systemically address the multiple systems bearing on the well-being of American children reveals a significant flaw in NCLB's use of a system's viewpoint.

### **Summary of systems thinking & nclb.**

To summarize, NCLB has serious flaws when analyzed according to the disciplines comprising Senge's view of systems thinking – mental models, personal mastery, shared vision, team learning, and systemic thinking. All of Senge's disciplines reveal problems with NCLB from a systems perspective.

What to do? Incorporating federalism as an operating principle of NCLB will do much to meet the problems with shared vision and team learning. It may even be used to promote personal mastery should a state educational system attempt such an approach. That, at least, was part of Iowa's intent in rejecting student standards in favor of standards for teaching and professional development. Personal mastery undergirds the State of Iowa initiatives in reading and math.

Federalism might also provide a different mental model from that currently embodied in NCLB. In a much quoted Supreme Court dissent, Justice Brandeis articulated the idea of states serving as laboratories, particularly in those situations when a solution to an identified problem didn't appear to be obvious.

There must be power in the states and the nation to remold, through experimentation, our economic practices and institutions to meet changing

social and economic needs. ...To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. (*New State Ice v. Liebmann*, 285 U.S. 262, 311)

By setting a direction (leaving no children behind), by adopting a growth model to benchmark progress towards the goal, and by using federalism to encourage states to experiment with a variety of approaches to improving the learning of all students, America could systemically move forward towards promoting the educational well-being of all children.

It is questionable that the current No Child Left Behind Act represents a constitutionally viable system of federalism. Two remedies have been suggested to address possible constitutional flaws – (1) a lawsuit challenging the constitutionality of NCLB in order to invalidate the provisions violating federalism, or (2) convincing federal legislators to modify the law in a manner that addresses federalism concerns.

How to incorporate a systems viewpoint still remains a question. Embracing federalism still ignores the systems of families, of childcare, and of preschool education, not to mention other systems impacting the well-being of children. Subsidizing a parent (father or mother) to remain at home to be the primary caregiver for young children from birth to age two or three because this represents a critical stage in emotional and cognitive development, subsidizing a system of licensed child care providers for working families, and providing a free and public preschool education for all four-year olds; each of the foregoing begins to address the needs of those systems and give recognition to their importance to the educational system. These and other approaches recognize the need to take a systems viewpoint towards the larger issue of valuing all children in our society. None of these approaches has immediate, short-term results.

However, their importance to education over the long-haul is well documented in a variety of research studies. A veteran newspaper editor summarized America's stance with this observation: "We're the richest nation in the world, yet we view education as an expense, not an investment" (Troy, p. 1). Our systems viewpoint must also embrace the social and emotional well-being of children if we truly wish to leave no child behind educationally. Finally, as will be shown, embracing federalism without embracing a systems view focused upon addressing young people's well-being also means we will continue to ignore the negative impact of poverty upon both learning and children's well-being.

### **Adaptive Work and NCLB**

#### **Introduction.**

The approach used by the No Child Left Behind Act towards achievement gaps ignores the shortcomings of other systems impacting the well-being of children in American society. From birth through age eighteen, children slightly more than 8% of their total life in a public school classroom (see Appendix G). Yet NCLB places responsibility for the success or failure of children to learn solely on the educational system and ignores the systems impacting the remaining 92% of children's lives during the formative and emerging periods of their lives.

The failure to systemically address the multiple systems bearing on the well-being of American children has several consequences. First, the success in achieving the goal of NCLB will be limited as other systems impacting child welfare will not be addressed in any major fashion. Second, and more important, by not recognizing the important role of other systems, we will not be making the fundamental changes that need to occur in order for America to be recognized as a society that places primary value upon the nation's children. Third, we will be

delaying the start of the adaptive work that needs to occur in order for us to realize the promise of America.

The agenda, all children learning, is the right one. The vision of America, equitable opportunities for all, is one we still strive to realize. Slavery wasn't abolished until 89 years after our country's founding, a founding based upon the recognition that all people are created equal, that they are endowed by rights deemed incapable of alienation, that these rights included liberty. Women didn't receive the vote until 147 years after it was proclaimed that "all men are created equal." The original inhabitants of our land weren't recognized as citizens until 1924, some three hundred years after the first European settlements were established on our shores. Segregation in public education wasn't abolished until 178 years after America declared its independence and freedom as a nation, and some 86 years following the ratification of the Fourteenth Amendment, specifically adopted to protect the freedom granted to the newly freed slaves, whereby all people were promised the equal protection of the law. America's declaration of war on poverty occurred only 38 years ago. While we have come far in our journey, while we have overcome some obstacles to equality of opportunity, we still have far to go. The gap between the vision of America and current realities remains huge. The work of equal opportunities for all as it pertains to public education, if it is to be effective, must be addressed as part of a larger, more comprehensive, systemic effort that recognizes the nature of the adaptive challenge facing us.

### **Adaptive work.**

Just what is adaptive work? According to Ronald Heifetz, adaptive work "consists of the learning required to address conflicts in the values people hold, or to diminish the gap between the values people stand for and the reality they face" (Heifetz, 1994, p. 22). Viewed over time,

our national value system centers on achieving the promise of America. In each of the transformations mentioned earlier, people had to change the way they thought about slavery, about women voting, and about segregation. The nation had to change its image of tribal members from that of aboriginal savages to American citizens. These changes did not come easily nor did they happen overnight. In some instances, the change in attitudes and values remains yet a “work in progress.” As can be seen from the examples given, adaptive work is difficult, long-term, and on-going. It involves problems for which there are no ready or easy answers. Solutions cannot be easily provided within existing frameworks and methods. Instead something new and different must be tried. In proposing new solutions, it is difficult to foresee all of the unintended consequences. For example, the nation is still struggling with how to best provide assistance to those in economic need without creating a culture of dependency.

Heifetz differentiated between “adaptive” problems, which have no readily apparent solutions, and “technical” problems. According to Heifetz, “Problems are technical in the sense that we know already how to respond to them” (Heifetz, 1994, p. 71). Heifetz cautioned that solutions to technical problems were not necessarily easy or unimportant. “What makes a problem technical is not that it is trivial; but simply that its solution already lies within the organization’s repertoire” (Heifetz & Linsky, p. 18). Often technical problems require great ingenuity and professional expertise in order to be solved. Drawing upon his own professional medical experience, Heifetz discussed a hospital’s emergency room to illustrate his meaning. An emergency room staff’s solutions to medical problems save lives and are part of a large organizational effort. However, the professional expertise required to solve a problem is not the critical criterion that denotes a technical problem. As Heifetz discussed technical problems, he observed that for technical problems,

the necessary knowledge about them has been digested and put in the form of a legitimized set of known organizational procedures guiding what to do and role authorizations guiding who should do it. For those situations, we turn to authority with reasonable expectations. In our various social systems, our authority structures and the norms they maintain govern thousands of problem-solving procedures. (Heifetz, 1994, pp. 71-72)

To summarize, technical problems are those for which solutions are known, even though the problem-solving application requires great expertise. Adaptive problems are those for which solutions are not readily apparent or known. Engaging in work to solve adaptive problems requires that leaders be “expert in the management of processes by which the people” come to agreement about how to resolve the problem (Heifetz, 1994, p. 85). Heifetz further noted that

with adaptive problems, authority must look beyond authoritative solutions. Authoritative action may usefully provoke debate, rethinking, and other processes of social learning, but then it becomes a tool in a strategy to mobilize adaptive work *toward* a solution, rather than a direct means to institute one. (Heifetz, 1994, p. 87)

In working to solve adaptive problems, authority’s primary responsibility is to “induce learning by asking hard questions and by recasting people’s expectations to develop their response ability” (Heifetz, 1994, p. 84).

The underlying goal of NCLB goes beyond education and addresses a fundamental question, “How do we as a society fulfill the promise of America for all our nation’s children and ensure that no child gets left behind?” To illustrate the issue, Ron Heifetz drew an unusual lesson about children’s well-being from a story held in common by three major religions – Judaism, Islam, and Christianity. The story centers on Abraham’s near-sacrifice of his son, Isaac. Admitting that he dreads confronting the story, Heifetz proposed that perhaps the main message of the story is one that our society has yet to recognize and take to heart, the message that God no longer wishes us to sacrifice our children (Heifetz, 2004, p. 1). Instead we need to fully confront the issue of children’s well-being in a systemic manner.



Before we instinctively recoil from a message contained in a story centering on child-sacrifice, perhaps we should consider how we, the world's longest living democracy, could possibly be viewed as tolerating any such practice. Perhaps part of the evidence lies in the absence of adequate day-care for the children of America's working families, in the absence of adequate health care for all of America's children, and in the inadequate funding provided schools working with higher percentages of lower socioeconomic students. Additional evidence points to the fact that we as a nation provide subsidies to a variety of business sectors, but not to the parents of children aged birth to three-years-of-age in order to provide the nurturing environment so vitally important to health and brain development. Other industrial nations provide subsidies for one parent to stay home with young children until they reach an age of three or four, but not America. Based on figures from the U.S. Bureau of Labor Statistics and the U.S Census, in 1970 the percent of "Mothers in the Work Force" with children up to age five was 28% of women in two-parent families and 50% of women in single-parent families (Rubiner, p. 1B). By 1998 those figures had increased to 78% of women in two-parent families and 70% of women in single-parent households (Rubiner, p. 2B). If one moves beyond the age of five to consider figures for working mothers of school-age children, the figures are similar. In 1998 the national average in terms of the percentage of school-age children with both parents (in a two-parent family) or the only parent (in a single-parent household) working was 66% (Carney, p. 1A). Iowa led the nation with 83.2% of parents of school-age children in the work force (Carney, p. 1A). Following closely behind were North Dakota [83.0%], South Dakota [79.4%], Vermont [79.0%], and Nebraska [78.7%] (Carney, p. 8A). These figures put the idea of quality child care, particularly the time periods before-school and after-school, in a different perspective.

So perhaps the message contained in the story of Abraham and Isaac does contain some relevance for America.

The simple fact that we still struggle with the notion of how to provide assistance without inadvertently creating a cycle of increasing dependency does not mean that we should abandon the effort to seek solutions. As struggling with the question of how to provide assistance without creating dependency has not meant the abandonment of business subsidies and tax breaks for the wealthy, neither should it mean the abandonment of our efforts to win the war on poverty. Nor should we refrain from tackling the difficult challenge of creating a system that will indeed leave no child behind. This will require adaptive work, and it is the task of adaptive leadership to expose the internal contradictions between our aspirations and our current position in falling short of our goal. According to Heifetz, the short-term task of leadership lies in keeping us focused on our goal and in “making progress on an adaptive challenge.” The long-term task of leadership must focus on “developing adaptive capacity” (Heifetz, 1994, p. 129). The development of adaptive capacity means framing the issue so that adaptive work, systems thinking, and federalism form powerful links with which to move forward toward the realization of America’s promise for its children and young people.

### **Gaps between the promise of america and current reality.**

So, what are some of the current gaps between current reality and America’s vision for its society? Most disconcerting are the variables associated with poverty and educational attainment, especially in terms of comparisons between the United States and other industrialized nations, comparisons that show other nations as being further along than is America.

Of the world's 29 richest nations, the United States' child poverty rate is the second-worst of the major industrialized countries according to a report by the U.N. Children's Fund

(Associated Press, 2000, p. 7A). 22.4% of American children live in poverty, a rate that is lower than only one other country, Mexico, which has 26 % of its children living in poverty, according to the report issued by the U.N. Children's Fund. Compare the U.S. rate with the top three countries – Sweden with 2.6%, Norway with 3.9%, and Finland with 4.3% (Associated Press, 2000, p. 7A). According to the news article describing the report,

The report countered the assumption that more single-parent families mean more child poverty. The study found that Sweden has the highest share of children living with one parent but the lowest child-poverty rate.  
(Associated Press, 2000, p. 7A)

The figures in 2000 for U.S. child-poverty rates are not much different from those found in 1991. At that time, "21.5% of American children younger than age 18 lived in families below the poverty level" (Taylor, p. 10). In terms of international comparisons compiled by the Children's Defense Fund in 1996, the U.S. ranked "dead last" among the 18 leading industrialized nations of the world with poverty rates three times greater than those of France and Germany (Taylor, p. 10). As depressing as these numbers sound, what should alarm educators and national leaders is the finding that "there is evidence to suggest that differences on poverty-related social indicators are associated with differences in school outcomes both internationally and nationally" (Taylor, p. 10). Further evidence linking school achievement and socioeconomic factors arises from comparisons of the worlds inhabited by Japanese, German, and American children in Table 2 below (Jaeger, p. 122). According to Jaeger, "Children in the three nations experience vast differences in economic support and family structure and stability that are essential to school success" (Jaeger, p. 122). Evidence cited by Jaeger included the following:

- the U.S. child-poverty rate was more than two times greater than that of West German children.

- as an indication of family instability the divorce rate for American women was approximately three times that of West German women and four times that of Japanese women.
- poverty rates for children living in single-parent homes as well as the percent of children living in single-parent homes are highest in the U.S.

*Table 2*  
*Comparative National Data: Poverty In Single-Parent Homes*

<u>Country</u>	<u>% of children in single-parent home</u>	<u>% of single-parent poverty</u>
Japan	6%	NA
W. Germany	14%	35%
United States	25%	50%

What do these figures have to do with school learning? In analyzing the differences in achievement scores from the First International Mathematics Study, researchers discovered that "virtually all of the variation in mean test scores can be predicted by the child poverty rate" (Jaeger, p. 122). Furthermore, approximately three-fifths of the variation in scores could be "predicted by the poverty rate among children in single-parent households" (Jaeger, p. 122). Regarding divorce as a factor of family stability, in his analysis of student scores on the Second International Mathematics Study, Jaeger concluded that "childhood involvement in divorce alone shows similar predictive power with regard to students' mean arithmetic scores" (Jaeger, p. 122). His conclusion? "Societal factors *are* associated with differences in national performance on standardized mathematics tests" (Jaeger, p. 122).

Poverty was also linked to poor literacy performance in Ireland. One of the major findings of a report from the Education Research Centre was that "up to 30 per cent of primary

schoolchildren in poorer areas suffer severe literacy difficulties” (Flynn, p. 7). According to the Minister for Education and Science, this is much higher than would normally be expected. The Minister, Ms. Hanafin, observed, “We know from previous research that about 10 per cent of children in our schools would have serious reading difficulties. Yet this report shows that the number of children in designated disadvantaged schools with serious reading difficulties is between 25 and 30 percent” (Flynn, p. 7). Regarding the impact of societal factors on reading, general secretary of the Irish National Teachers Organisation [sic], John Carr “said many factors which affected literacy standards and educational attainment lay outside the school’s influence.” Carr continued:

For example, one in four children in Ireland lives in families where the household income is half of the national average income. This translates into children coming to school hungry, poorly dressed, no books, no money for extras. Is it any wonder there are reading difficulties when this is the daily reality for so many children? Food and clothing, not books, are the priorities here. (Flynn, p. 7)

Addressing the question, “[Has] research ... failed to explore what *actually* generates differences in achievement among school districts and states in America,” a researcher at the University of Missouri responded in the negative (Emphasis in original) (Biddle, p. 10). He explained:

On the contrary, a good deal of research has now appeared concerning the real causes of achievement deficits, and evidence from these efforts suggests strategies for improving American education that are quite different from those being advocated in Washington. For the purposes of this article, I focus on two such causes, both associated with social problems that are particularly severe in our country: poor school funding and poverty among children. (Biddle, p. 10)

Focusing on child poverty, Dr. Biddle observed that the child poverty rate in the United States “far exceeds that of other industrialized nations” (Biddle, p. 11). Citing the Luxembourg Income

Study that compared income distributions in Western industrialized nations over the course of a decade, Biddle pointed to its findings:

Their figures show that the rate of child poverty in our country is more than 50% higher than for all other nations studied and five to eight times greater than the rates for some nations with which we are often compared with regard to educational achievement. (Emphasis added) (Biddle, p. 11)

He translated child poverty into terms readily understandable to most readers:

[C]hildren in America [impacted by poverty] are likely to live in substandard housing, have an inadequate diet, wear only cast-off or torn clothes, lack health insurance, suffer from chronic dental or health problems, and be members of a family headed either by a single mother or by two over-burdened parents who subsist on welfare or work long hours at miserably paid jobs. (Biddle, p. 11)

Noting that “poor children ... are uniquely handicapped for education because of their poverty,”

Professor Biddle illustrated the manner in which poverty negatively impacted education (Biddle, p. 11):

The homes of poor children provide little access to the books, writing materials, computers, and other supports for education that are normally present in middle-class or affluent homes in America. Impoverished students are also distracted by chronic pain and disease; have poorer nourishment; tend to live in communities that are afflicted by physical decay, serious crime, gangs, and drugs; and must face problems in their personal lives because their parents or older siblings have left home, died, been incarcerated, or lead seriously disturbed lives. (Biddle, p. 11)

Having noted and illustrated the negative impact exerted by child poverty upon education, Dr.

Biddle pointed to a “general unwillingness to debate or even think about poverty and its impact within the current political climate in America” (Biddle, p. 11). He declared:

This is absurd when it comes to poverty and education. Child poverty is not only a huge social problem in our country but also an obvious generator of educational difficulties, and it deserves at least as much attention as any other component of (dis)advantage. (Biddle, p. 11)

Comparative statistical information about children's well-being has not drawn much attention in the United States. Perhaps part of the reason for the silence and inattention is an unconscious recognition of the complexity of the problem. Perhaps the silence lies in the absence of anyone being clearly responsible for the problem. And perhaps part of the inattention lies in the absence of any clearly defined solution to the problem of America being at the bottom of the heap when children's well-being is compared across industrialized countries. But perhaps another indicator of why such figures cause no public outrage is the finding cited by another researcher: "Of all industrialized nations, the United States and South Africa accept the *least* public responsibility for young children" (Lubeck, p. 471). The mind-set driving such an attitude was summarized in this fashion:

Despite the fact that government plays an increasingly prominent role in people's lives, the ideology of private responsibility remains firmly etched in the American consciousness. Child bearing and rearing are perceived to be a parental/family responsibility, and it is primarily parents who finance child care and early education for their children. The inability to provide well for children, to afford child care or decent housing or needed health care, has thus signaled *individual rather than structural failure* [emphasis mine]. Although recent efforts to increase public responsibility for young children in the United States have shown some success, the ideology of individualism and private responsibility continues to hamper the development of a coherent family policy. (Lubeck, p. 472)

To illustrate the differences in responsibility assumed by families as compared to the federal government according to monies expended, examine the following figures. Parents expended \$12 billion in 1989 compared to federal expenditures of \$6.8 million in 1988 (Lubeck, p. 488, n. 25).

How does this compare with other major industrialized countries? In France, except for those opting out, 100% of all children receive free preschool education between the ages of three and six while about "30% of infants and toddlers receive subsidized childcare" (Taylor, p. 11). During the same period, approximately 30% of American children received a preschool education

– there was no breakdown between private preschools and publicly-funded Head Start preschools in terms of percentages (Taylor, p. 11). So, comparatively speaking, American society does not fare well when examining publicly funded preschool and subsidized childcare. One researcher spelled out exactly what was not being provided by the United States that was provided by many of the world’s industrialized nations.

Above all, the U.S. does not provide various tax-supported services, common in other industrialized nations, that serve the needs of poor children: a national health care system, tax-supported preschools, paid leaves for child and prenatal care, universal child allowances, child-support programs for single parents, safety nets for families with special needs, and secure unemployment or low-wage supplemental income programs. (Biddle, p. 11)

How do we fare in terms of moving families out of poverty? According to a Children's Defense Fund study conducted in 1994 that compared performances of eight industrialized countries, the U.S. ranked last. For the period 1984–1987, Table 3 below shows performances of three countries in terms of lifting low-income children's families out of poverty (Taylor, p. 11):

*Table 3*  
*Comparative Public Policy Data: Lifting Low-Income Families Out of Poverty*

<u>Country</u>	<u>% of Low-Income Families w/children Lifted Out of Poverty</u>
France	78.2%
Germany	66.7%
U.S.	8.5%

Not only do we compare poorly with other industrialized nations, the picture inside the United States got worse for poor children and for single-mother households during the last decade of the twentieth century according to a study completed in 1999 by the Center on Budget and Policy Priorities. The study reported that “only 40 of 100 poor children received assistance in 1998, the lowest since the 1970s” (Mathis, 1999, p. 8A). In addition, the “average income for



the most destitute single-mother households fell from \$8,624 in 1995 to \$8,047 in 1997”

(Mathis, 1999, p. 8A). When you take inflation into account, the decline in income worsens.

Figures for the change in family incomes from 1977-1988 for the lowest income deciles also show declines. For the lowest income group the decline, expressed in terms of 1987 dollars, was -14.8% (Phillips, 1990, p. 17). Figures for the second, third, fourth, and fifth income deciles also showed lower family incomes: -8.0%, -6.2%, -6.6%, and -6.3% respectively (Phillips, 1990, p. 17). Figures for the wealthiest families, those in the tenth income decile, showed a +16.5% increase during the same time period (Phillips, 1990, p. 17).

For the sake of making a fuller comparison, what happened at the other end of the socioeconomic scale during the 1990s and beyond? Was the worsening economic situation at the lower end duplicated by a similar economic decline at the upper economic levels of American society? Quite the opposite, according to financial figures from a variety of sources. From 1996 through 1999 the number of millionaire households increased by 67% (Bounds, p. B1). Or, during the decade between 1989 and 1999, the number of millionaire households witnessed a 200% increase (Bounds, p. B1).

Nor did the 21st Century witness a decline in the number of American millionaires. According to figures from Merrill Lynch and Capgemini, the number of millionaires increased by 14% from 2003 to 2004 (Gilliganair, p. 30). More recently figures from *Forbes* indicated that the number of billionaires worldwide increased by 17.8% from 2004 to 2005 (Kroll & Goldman, p. 125). While one might initially question the significance of worldwide figures for America, closer examination reveals an overwhelming dominance of Americans on the *Forbes*’ list of billionaires. First, Americans Bill Gates and Warren Buffett head the list. Of all the countries in the world, Americans represent 50% of the top ten richest people in the world. If

you expand the list to the top 20 wealthiest people, Americans represent 55%. If one further expands the list to include the top 50 of the world's richest persons, Americans still constitute 50% of the world's total billionaires (Kroll & Goldman, pp. 125, 166). As *Forbes* noted, "The rich had a good year" (Kroll & Goldman, p. 125).

An economist characterized the differing situations between the richest and poorest segments of American society in the following manner.

By the close of the 1990s the United States had become more unequal than at any other time since the dawn of the New Deal – indeed, it was the most unequal society in the advanced democratic world. The top 20 percent of households earned 56 percent of the nation's income and commanded an astonishing 83 percent of the nation's wealth. Even more striking, the top one percent earned about 17 percent of national income and owned 38 percent of national wealth...

In contrast, the bottom 40 percent of Americans earned just 10 percent of the nation's income and owned less than one percent of the nation's wealth. (Boshara, pp. 91-92)

Another researcher pointed to the cause of increased child poverty and the increasing inequitable distribution of wealth in the nation:

For one thing, recent shifts in the industrial culture, political climate, and tax laws of our nation have generated a massive upward redistribution of income and wealth – away from poor and middle-class Americans and into the hands of the super rich. (Biddle, p. 11)

More recent data about income inequalities in America suggest the situation has worsened for lower income groups and the families therein. In 2007, figures for the top 1% of the wealthiest income group indicated a disturbing comparison with similar figures for 1928, the year before the Great Depression commenced. According to Robert Reich, former U.S. Secretary of Labor and currently a professor of public policy at the University of California, Berkeley, "surging inequality" in America was responsible for both the Great Depression (viewed as beginning with the stock market crash in 1929) and the Great Recession of 2008:

[I]n 1928 the richest 1 percent of Americans received 23.9 percent of the nation's total income. After that, the share going to the richest 1 percent steadily declined. New Deal reforms, followed by World War II, the GI Bill and the Great Society expanded the circle of prosperity. By the late 1970s the top 1 percent raked in only 8 to 9 percent of America's total annual income. But after that, inequality began to widen again, and income reconcentrated at the top. By 2007 the richest 1 percent were back to where they were in 1928 – with 23.5 percent of the total. (Reich, p. 13)

Jeff Madrick, senior fellow at the Roosevelt Institute and the Schwartz Center for Economic

Policy Analysis, confirmed Reich's figures for the top 1% and related that to a decreased share to total income for the bottom. Madrick articulated his economic analysis:

[T]he top 1 percent of families made 23.5% of all income in 2007, including capital gains, compared with less than 10 percent in the early 1970s. It hadn't risen nearly to that level since 1928.... In sum, the top fifth of families increased their share of total income from 41.1 percent in 1973 to 47.3 percent in 2007. The bottom 80 percent lost share. (Madrick, p. 21)

Dean Baker, co-director of the Center for Economic and Policy Research, stated that "rising inequality is at the center of the current economic crisis [of 2008+]" (Baker, p. 17). He attributed the cause to government policy. According to Baker:

The first Great Depression was not just the result of mistaken policy during the initial banking crisis; it was caused by ten years of inadequate policy response... And since that increase in inequality [the Great Recession of 2008+] was not a natural process but the result of conscious policy, it can be reversed.... [U]nions have long been a major force in reducing inequality. Whatever can be done to protect the right to organize and allow workers the option of joining unions will help to reduce inequality. It is not difficult to develop policies to reduce the inequality that has given us a crisis-prone economy. The problem is getting the political will. (Baker, p. 16; p. 17)

Currently, then, we're seeing an increase in poverty as a result of public policy without a public policy designed to systemically address the increasing poverty, a course that puts increasing numbers of American families and children at risk and insures that increasing numbers of children will get left behind in spite of the public school systems efforts to educate them.

So, what does all of this mean for American schools when their society fails to address the larger systemic issues of children's well-being, when it views student failure as a school failure, and when it views school failure as an individual family failure? National efforts to change the view of school failure as a structural failure of the nation remain absent. We continue on a course that continues to camouflage the systemic issues of children's well-being in America. In the words of one analyst, "The most prosperous nation on earth is failing many children" (Jaeger, p. 126). Dr. Angela Taylor observed that if society intends to expect that students and schools in America will measure up to world class standards regarding academic performance, then Americans "have every right to expect our political and business leaders to hold themselves accountable for implementing policies and business practices that help to ensure 'world class' conditions (which) support student learning and achievement" (Taylor, p. 12). In comparing U.S. performance against other industrialized countries that provide structural support for families in poverty, Taylor concluded, "Perhaps it's not that the French, Germans, and Japanese expect more *from* their nations' children but rather that they expect more *for* them" (Taylor, p. 12).

An editorial in the *Des Moines Register* two years later made a similar point in discussing the situation of latchkey children who leave for school after their parents have left for work and who arrive home before their parents complete their day's work.

The problem is that society feels little responsibility for making sure good child care is available or for assisting lower-income families who can't fit the cost of good child care into their budgets. It is not just those receiving welfare or just off welfare who struggle with this. Why is Iowa so stingy?

Tough, is the unspoken but loud and clear message. People shouldn't have children if they can't manage. Instead of treating children as treasures, we treat them as liabilities. (*Des Moines Register* Editorial-page Staff, p. 4AA)

Another illustration of the issue of responsibility and expectations emerged from a recent study reported in *Archives of Pediatrics & Adolescent Medicine* that was reported in newspapers.

According to an article from *The Houston Chronicle* reprinted in a Midwestern newspaper, the study found that as immigrant Hispanic teens became more acclimated to American culture, “they become dramatically more sexually active” (The Houston Chronicle, p. 3A). More disturbing was how this finding fit a pre-existing pattern emerging from other research, a pattern termed the “Healthy-Immigrant Paradox” (The Houston Chronicle, p. 3A). According to the article, the research findings suggest

that Hispanics coming to the United States are healthier than second- and third-generation U.S. residents from the same countries. Various research has found that less-Americanized Hispanic children have healthier diets, better immunization rates, fewer suicide attempts, and decreased use of tobacco, alcohol and drugs than more Americanized adolescents. (The Houston Chronicle, p. 3A)

The foregoing are all components of the system of “children’s well-being” which are not being addressed by NCLB. Comparative international data showing our nation’s poor performance in addressing children’s well-being includes statistical information about the following:

- child poverty rates;
- single-parent poverty rates;
- provision for universal free preschool; and
- ability to lift low-income families out of poverty.

Additional information was presented indicating that national child-poverty rates were most responsible for the variations in national mean test scores. Finally, information was presented about the increased inequities in the distribution of wealth in this country by the end of the twentieth century, a fact that greatly impacts children’s well-being in

America. These factors greatly impact children's ability to benefit from education and to make education a life priority, but they are ignored by NCLB.

## **Federalism as the Cornerstone for Adaptive Work Applied to Systems Thinking**

### **Introduction.**

Closing the gap between the promise of America and current reality requires adaptive work. Attitudes must be changed regarding how best to promote the well-being of America's children and young people in order to truly ensure that "No Child Will Be Left Behind." This researcher believes the adaptive work must take place within a systems framework if we are serious about impacting the well-being of children and young people since more than the educational system impacts their lives. And since the answers and approaches to addressing the problem of children's well-being are not obvious, we need experimentation. America faced the threat to its economic well-being in much the same fashion during the Great Depression with the New Deal programs in which both the states and federal agencies served as experimental laboratories for finding workable solutions. Changing the way we view our world links systems thinking and adaptive work, according to Senge. "Eventually, systems thinking forms a rich language for describing a vast array of interrelationships and patterns of change. Ultimately *it simplifies life* by helping us see the deeper patterns lying behind the events and details" (Emphasis Senge) (Senge, p. 73).

### **Benefits of federalism.**

Contemporary thinkers and Supreme Court justices have identified at least four benefits of America's federal system of government. First is the ability of state governments to check the oppression of the federal government through lobbying Congress and litigation.<sup>14</sup> Thus far no states have initiated legal action, but legal action is being considered regarding the issue of

unfunded federal mandates and NCLB. This writer is unaware of any pending legal challenges based upon constitutional issues. However, several state legislatures have approved legislation calling either for exemptions from NCLB or for changes to be made in NCLB.

Second is the ability of state and local governments to involve citizens in the political process by training citizens in democracy through participation and by promoting accountability, thus enhancing voter confidence in the democratic process. Local governments have a greater ability to allow individuals to actively participate in governmental decision-making.<sup>15</sup> Iowa's educational system of "local control" regarding education provides a prime example.

The third benefit of federalism lies in its ability to provide diversity by allowing citizens in each region of the country (or state) to create the political and social climate they desire.<sup>16</sup> For example, Iowa annually devotes over 60% of its state budget to building and sustaining a pre-eminent educational system (see Appendix H)<sup>17</sup> that results in Iowa having the highest adult literacy rate in the nation<sup>18</sup> as well as having the top city (Iowa City) in the country in terms of college-educated adults as a percentage of the city's total population (see Appendix I)<sup>19</sup>.

In a much quoted dissent, Justice Brandeis articulated a fourth benefit of America's federal system of government when he observed that each state is allowed to "serve as a laboratory" that may "try novel social and economic experiments without risk to the rest of the country" (*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311). Justices in subsequent Supreme Court rulings have frequently cited Justice Brandeis' defense of state autonomy as a bulwark of federalism.<sup>20</sup> Examples of programs that originated in state legislatures prior to proving their worth and being expanded into nationwide programs include unemployment compensation, minimum wage laws, no-fault insurance, public financing of political campaigns, hospital cost containment, and prohibitions against discrimination in housing and employment (Merritt, p. 9).

Thus the distribution of power among fifty-one different governments in a federal scheme supports the notion of strong state governments as a major source of innovation and experimentation. Iowa's system of "local control" for education provides a prime example, not only of the power to be innovative, but also for that innovation to have enough strength to resist the lemming-like rush to leap into the abyss of educational decisions being made at a level far removed from the learner. Such an approach caused one national educational commentator to refer to Iowa as "the last bastion of sanity" (Bracey, p. 1).

### **Summary**

This chapter viewed the No Child Left Behind Act through the lens of two policy frameworks, that of systems thinking and that of adaptive work. Peter Senge's model for systems analysis was presented. Each of the five disciplines forming the core of Senge's system – mental model, personal mastery, shared vision, team learning, and systems thinking – was explained before examining NCLB against the standards posed by each discipline. Following this examination, a summary of the analysis was presented within the context of federalism. Next, Ronald Heifetz' concept of adaptive work was explained. Data regarding the well-being of families and children in America were also presented and examined comparatively, both in terms of similar data from other nations around the world and with the model of adaptive work. Issues of poverty and of poverty's impact on student learning were addressed as well. Comparative data was shared indicating that the U.S. is one of the world's least effective industrialized nations in confronting poverty as a public policy priority. Finally, adaptive work, systems thinking, and federalism were considered as integral partners of a larger concept, that of achieving the goal of the NCLB legislation. Discussion included a consideration of the benefits of federalism.



Thus far this paper has examined NCLB through the perspective of two directors of state public education systems, through the frameworks of adaptive work and systems thinking, and through the lens of federalism as a policy approach which could incorporate systems thinking and adaptive work. The larger task remains, that of examining whether NCLB is itself constitutionally sound with regards to federalism. The remaining chapters will address the constitutional issues undergirding federalism, beginning with the Guarantee Clause.

## Chapter 5

### The Guarantee Clause

#### Introduction

Article IV, Section 4 of the Constitution of the United States constitutes, in its entirety, what has been termed the Guarantee Clause. It reads:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence. (U.S. Constitution, Article IV, § 4)

The vagueness of the wording raises many questions. Which branch of the federal government is responsible for implementing this guarantee? What are the components of a republican government? How is the guarantee to be carried out? To whom should the states make application when threatened with domestic violence? The lack of specificity calls to mind the vagueness of the ancient Greek oracles, capable of multiple interpretations. One is also reminded of Winston Churchill's characterization of Russia as "a riddle wrapped in a mystery inside an enigma" (Bartlett, p. 920b [Radio broadcast, October 1, 1939]).

#### Historical Background

Several sources, ranging from the Constitutional Convention to the subsequent ratification debates in the various states, combine to suggest that the Guarantee Clause was intended to limit federal intrusions into state autonomy. First, the Virginia Plan for a federal Constitution as presented by Edmund Randolph on May 29, 1787, included language similar to the actual Guarantee Clause that emerged from the Philadelphia proceedings: "11. Resd. That a Republican Government and the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State"

(Farrand, I, p. 22). Prior to introducing the Virginia Plan, Randolph had noted the deficiencies of the Confederation and had concluded that the remedy needed to proceed according to “the republican principle” (Farrand, I, p. 19). This was expanded by Paterson’s notes of Randolph’s same presentation whereby he listed the Guarantee under the heading, “Checks upon the Legv. And Ex. Powers” and noted “A Guaranty. By the United States to each State of its Territory, etc.” (Farrand, I, p. 28). In a subsequent discussion regarding a “national Legislature,” Randolph provided further clarification two days later when he “disclaimed any intention to give indefinite powers to the national Legislature, declaring that he was entirely opposed to such an inroad on the State jurisdictions” (Farrand, I, p. 53).

A second source points to the Framers viewing the Guarantee Clause as protecting states from undesired federal intrusions into state sovereignty. Writing in *The Federalist Papers* Alexander Hamilton observed:

The inordinate pride of State importance has suggested to some minds an objection to the principle of a guaranty in the federal government as involving an officious interference in the domestic concerns of the members. A scruple of this kind would deprive us of one of the principal advantages to be expected from union, and can only flow from a misapprehension of the nature of the provision itself.... The guaranty could only operate against changes to be effected by violence. (Federalist No. 21, p. 108)

The ratification debates in the various state conventions furnish yet another source indicating that the Guarantee Clause expressed an intent to preserve state sovereignty within a framework of federalism at the time the Constitution was being adopted by the people of the United States. Typical are the remarks by Jasper Yeates to the Pennsylvania convention:

Lest anything, indeed, should be wanting to assure us of the intention of the framers of this constitution to preserve the individual sovereignty and independence of the States inviolate, we find it expressly declared by the 4th article, that “the United States shall guarantee to every State in this Union, a republican form of government. (Merritt, p. 31)

Political pamphleteers outside of the convention halls in the various states reiterated the same points. For example, a federalist with the pen name of Uncus, arguing in the *Maryland Journal*, that the Guarantee Clause was a restraint on national power, observed that

[s]o decided have the convention been in not infringing upon the internal police of the states, that they ordain in art. 4, sect. 4, that Congress shall not only allow, but “shall guarantee to every state in the Union, a republican form of government. (Kaminski et al, p. 58)

Even the opponents of the new Constitution viewed the Guarantee Clause as an effort to protect state autonomy. Anti-federalists argued, however, that the Guarantee Clause lacked the strength to achieve its objective. An anti-federalist using the pseudonym Centinel III wrote an essay that appeared in many states which argued that the new Constitution destroyed the various state governments in spite of the Guarantee Clause.

The convention, after vesting all the great and efficient powers of sovereignty in general government, insidiously declare by section 4th of article 4th, “that the United States shall guarantee to every state in this union, a republican *form* of government;” but of what avail will be the *form* without the *reality* of freedom. (Kaminski et al, p. 76)

Thus both the federalists and the anti-federalists recognized the Guarantee Clause as an effort to determine the boundaries of federalism between the state and federal governments.

The origin of the Guarantee Clause can be traced to Montesquieu’s extensive examination of historical republican governments and their failures. In his *Spirit of the Laws*, Montesquieu observed the following, which in turn was quoted extensively by Alexander Hamilton (Federalist No. 9, p. 42):

If a republic is small, it is destroyed by a foreign force; if it is large, it is destroyed by an internal vice.

Thus it is very likely that ultimately men would have been obliged to live forever under the government of one alone if they had not devised a kind of constitution that has all the internal advantages of republican government and the external force of monarchy. I speak of the federal republic.

This form of government is an agreement by which many political bodies consent to become citizens of the larger state that they want to form. It is a society of societies that make a new one, which can be enlarged by new associates that unite with it. (Montesquieu, 1748/2002, Book IX, § 1, p. 126)

Montesquieu's next chapter was entitled, "That the federal constitution should be composed of states of the same nature, above all of republican states" (Montesquieu, 1748/2002, Book IX, § 2, p. 127). Montesquieu explained the results of his historical analysis: "The spirit of monarchy is war and enlargement of dominion: peace and moderation are the spirit of a republic. These two kinds of government cannot naturally subsist in a confederate republic" (Montesquieu, 1748/2002, Book IX, § 2, pp. 127-128). In other words, for a federal republic to work, its constituent societies must also be republican. James Madison noted as much by stating his understanding of Montesquieu's political writing: "Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort than those of a kindred nature" (Federalist No. 43, p. 243). This provided an initial reason for the Guarantee Clause being inserted into the Constitution by the Framers.

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained. (Federalist No. 43, p. 242)

Madison continued to clarify the Guarantee Clause from this perspective:

As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican Constitutions... (Federalist No. 43, p. 243)

Both Hamilton (Federalist No. 9, p. 43) and Madison (Federalist No. 43, pp. 245-246) quoted the following advantage of a federal republic as explained by Montesquieu: “Should a popular insurrection happen in one of the confederate states, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound” (Montesquieu, 1748/2002, Book IX, § 1, p. 127). Accordingly, this became a part of the Guarantee Clause, as Madison explained it (Federalist No. 43, p. 244). Madison raised the issue whether or not this addition to the Guarantee Clause agreed with the theory of republican government.

At first view, it might seem not to square with the republican theory to suppose either that a majority have not the right, or that a minority will have the force, to subvert a government.... But theoretic reasoning ... must be qualified by the lessons of practice. Why may not illicit combinations, for purposes of violence be formed.... The existence of a right to interpose will generally prevent the necessity of exerting it. (Federalist No. 43, p. 244)

Interestingly, this understanding of the Guarantee Clause provided the basis for President Abraham Lincoln asking Congress to authorize the war powers of the federal government against the rebellion by the southern states. On July 4, 1861 President Lincoln spoke to a joint session of Congress. Lincoln began framing the issue as one of rebellion and not secession by observing:

The States have their status in the Union, and they have no other legal status. If they break from this, they can only do so against law and by revolution. The Union, and not themselves separately, procured their independence and their liberty. By conquest or purchase the Union gave each of them whatever of independence and liberty it has. (Richardson, p. 3228)

After reviewing the actions taken against Fort Sumter, Lincoln declared, “In this act, discarding all else, they have forced upon the country the distinct issue, ‘Immediate dissolution or blood’” (Richardson, p. 3224). Lincoln proceeded to discuss the questions raised by events in the South.

And this issue embraces more than the fate of these United States. It presents to the whole family of man the question whether a constitutional republic, or democracy – a government of the people by the same people – can or can not maintain its territorial integrity against its own domestic foes.

It presents the question whether discontented individuals ... can ... break up their government, and thus practically put an end to free government upon the earth. (Richardson, p. 3224)

Then Lincoln posed the ancient question which has troubled political thinkers since first recorded in the conversations began by the ancient Greeks, the question regarding the proper mix of freedom and control for democratic government. He asked, “It forces us to ask, Is there in all republics this inherent and fatal weakness? Must a government of necessity be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence” (Richardson, p. 3224)?

President Lincoln began framing America’s reply to the ancient question by noting the experimental nature of American government.

Our popular Government has often been called an experiment. Two points in it our people have already settled – the successful *establishing* and the successful *administering* of it. One still remains – its successful *maintenance* against a formidable internal attempt to overthrow it. (Richardson, p. 3231)

Addressing the question of how America’s experiment with republican government should be maintained, Lincoln pointed to the Constitution as a guide.

Lest there be some uneasiness in the minds of candid men as to what is to be the course of the Government toward the Southern States *after* the rebellion shall have been suppressed, the Executive deems it proper to say it will be his purpose then, as ever, to be guided by the Constitution... (Richardson, pp. 3231-3232)

Having noted the importance of the Constitution for resolving fundamental issues, President Lincoln proceeded directly to the Constitution’s Guarantee Clause.

The Constitution provides, and all the States have accepted the provision, that “the United States shall guarantee to every State in this Union a republican form of government.” But if a State may lawfully go out of the Union, having done so it may also discard the republican form of government; so that to prevent its going out is an indispensable *means* to the *end* of maintaining the guaranty mentioned; and when an end is lawful and obligatory the indispensable means to it are also lawful and obligatory. (Richardson, p. 3232)

As Lincoln noted, he had no choice but to come before Congress and ask that the war powers of the federal government be activated in order to “assure all faithful citizens who have been disturbed in their rights of a certain and speedy restoration to them under the Constitution and the laws” (Richardson, p. 3232):

It was with the deepest regret that the Executive found the duty of employing the war power in defense of the Government forced upon him. He could but perform this duty or surrender the existence of the Government. No compromise by public servants could in this case be a cure... (Richardson, p. 3232)

And in language reminiscent of the ancient Hebrews<sup>21</sup>, Lincoln concluded his address to the joint session of Congress with this exhortation: “And having thus chosen our course, without guile and with pure purpose, let us renew our trust in God and go forward without fear and with manly hearts” (Richardson, p. 3232).

Having covered much of the Guarantee Clause’s political ground, the next step is to explore how the Guarantee Clause was understood judicially. Other political uses will be discussed within the context of legal decisions featuring, either directly or indirectly, the Guarantee Clause. Although attempts were made to use the Guarantee Clause as a basis for eliminating slavery, beginning with the Congressional debates in 1819-1820 that culminated in the Missouri Compromise, they were unsuccessful because of a number of factors that would require a more lengthy explanation than available for this dissertation. As an English historian noted, “The question of the persistence of slavery in the United States can be answered only by examining the attitudes of the ascendant race and its ascendant sex” (Brogan, p. 289). Suffice it to say that the majority of adult white males during the first half of the nineteenth century held racist views towards non-whites in general and towards black people in particular.<sup>22</sup> Another contributing factor included Southern domination of Congress and the Supreme Court. Five of



the seven Supreme Court justices in the *Dred Scott* decision were from Southern states and were proslavery (Brogan, p. 315; Hall, 1992, p. 859). The Wilmot Proviso prohibiting slavery in any territories emerging in the aftermath of the Mexican War could not be passed. Other legislation favoring the Northern states could not be passed by Congress until the Southern congressman withdrew following their states' secession from the Union, e.g., a protective tariff on English imports, a Homestead Act, and an act providing for the Transcontinental Railroad, all of which the Southern states viewed as threatening to the continued existence and expansion of slavery. Anti-slavery forces were insufficient in both number and strength to stop passage of the Fugitive Slave Law. Historians have identified the "Three-fifths Clause" of the Constitution (Art. 1, § 2, ¶ 3) as the mechanism responsible for such Southern dominance.<sup>23</sup>

Restricting further discussion of political uses of the Guarantee Clause only to those occurring within the context of legal decisions, the remainder of the chapter will be devoted to an examination of various court cases that featured Guarantee Clause questions and the court's interpretations of the Guarantee Clause. The court cases are divided into categories reflecting major interpretations of the Guarantee Clause and its applicability to the facts and issues of the case:

- The Guarantee Clause requires federal intervention to restore republican government to the state;
- The Guarantee Clause requires federal intervention to secure protection against abusive state governments;
- The Guarantee Clause requires that legislation be overturned because of its unrepresentative nature;

- The Guarantee Clause prohibits federal intervention so that the state continues to have a republican government; and
- Republican government and racial discrimination.

Within each category the cases are arranged chronologically. The case law emerging from the various opinions will be summarized at the conclusion of this chapter.

### **Case Law of the Guarantee Clause**

**The guarantee clause requires federal intervention to restore republican government to the state.**

*Luther v. Borden, 48 U.S. 1 (1849).*

*Facts & procedural history.*

The legal dispute arose within the context of the Industrial Revolution and the Dorr Rebellion in Rhode Island over dissatisfaction with the state government which, unlike its sister colonies, had never adopted a new constitution following the Declaration of Independence or the adoption of either the Articles of Confederation or the Constitution. Instead it continued to operate under a constitution derived from the colonial charter of 1663 from the King of England. This constitution operated to disenfranchise large portions of the urban population engaged in textile manufacturing while giving disproportionate power to the rural landholders of the state in terms of representation. As a result of this paradox – Rhode Island being one of the “foremost among American states in the Industrial Revolution” while at the same time being one of the most “backward” among American states in that its constitutional order still derived from a royal charter – a state of high tension existed between the verbiage of a constitutional republic and the political realities for many of the citizens (Hall, 1992, p. 515).

Rebuffed in numerous attempts to reform the state government, reformers took the Declaration of Independence to mean what it said, that the people could “alter or abolish”

oppressive government and could “institute (a) new government.” Reformers called for and held a state convention in 1841 where they drafted a new constitution that addressed the issues of urban disenfranchisement and malapportionment of representation. The new constitution was submitted for popular ratification with elections subsequent to its approval. At the same time, the existing charter government submitted a draft constitution of its own; however, it failed to garner the votes necessary for ratification. The new majority of voters under the reform constitution elected Thomas Dorr to be the new governor of Rhode Island. He and the newly elected legislators and other officials assembled in May 1842, and began to organize the new government. However, the existing governor and legislators refused to cede power and obtained a promise from President John Tyler that the federal government would provide military aid if violence occurred. Faced with the refusal of the charter government to step down, Dorr prepared to assert the authority of the new government by force with the armed backing of his supporters.

Armed with the promise of federal support from the President, the extant government on June 25, 1842, declared martial law, called out the state militia to enforce the martial law, and began a series of arrests. Under the authority of martial law a militiaman, Luther Borden, broke into the home of Martin Luther, a staunch Dorr supporter, and arrested him on June 29, 1842. Luther filed an action of trespass against Borden in the Circuit Court of the United States for the District of Rhode Island in October 1842 in which he contended “that the charter government was displaced, and ceased to have any lawful power” following the ratification of the new constitution and subsequent election (p. 38). The charter government denied that the new constitution under which Dorr claimed election had been ratified. Upon Luther’s offer to “prove it by the production of the original ballots, and the original registers of the persons voting,” the Circuit Court

rejected this evidence, and instructed the jury that the charter government and laws under which the defendants acted were, at the time the trespass is alleged to have been committed, in full force and effect..., and constituted a justification of the acts of the defendants as set forth in their pleas. (p. 38)

In November 1843, the Circuit Court ruled in favor of the defendants. Plaintiff Martin Luther subsequently filed a writ of error to the Supreme Court.

*Legal question.*

Was Borden acting under lawful orders when he broke into Luther's home? Which of the two opposing governments of Rhode Island was the legitimate one – the charter government or the government established by the voluntary convention? What is the substantive content by which a republican government is defined? Who should make the determination of whether or not a government is republican as required by Article IV, § 4 of the U.S. Constitution?

*Legal reasoning of opposing parties.*

Daniel Webster, arguing for the defendant, filed four pleas in justification of Borden's actions. These pleas averred that: first, there existed an insurrection to overthrow the state government by force; second, martial law was declared by the state legislature to defend the state; third, the plaintiff was "aiding and abetting said insurrection" (p. 2); fourth, the defendant Borden, as a member of the state militia, was ordered to arrest the plaintiff Luther under existing martial law. In support of these pleas, the defense presented a series of events to the Court showing that the existing charter government had been recognized as the legal government of Rhode Island by the King until July 4, 1776, after which it had been recognized as such by continental congresses and American governments under both the Articles of Confederation and the Constitution. Webster also reminded the Court that the Constitution guaranteed to each of the states "a republican form of government" that included a guarantee "to protect them against domestic violence" (p. 32).

Plaintiff's attorneys began their argument by establishing that since the Declaration of Independence, the idea that government is instituted "by the people" for "the benefit, protection, and security of the people" was embodied in the Constitution and the frame of government established by it; furthermore, such was the "supreme fundamental law of the State of Rhode Island" when the events under dispute took place (p. 19). Since American liberty is based upon the idea that "people are capable of self-government" and that American citizens "have an inalienable right... to establish and alter or change the constitution" of their government, plaintiff's actions were subject only to the "limitation provided by the United States Constitution, that the State government shall be republican" (p. 20). When the people of Rhode Island adopted a new constitution and proceeded elect and organize a new government, the "charter government was, *ipso facto*, dissolved" (p. 21). Accordingly, all subsequent actions by the charter government were void. The main issue before the Court, according to plaintiff Luther's attorneys, was whether or not the people of Rhode Island had the "right to adopt a State constitution for themselves, that constitution establishing a government, republican in form, within the meaning of the Constitution of the United States" (p. 21). If the answer is negative, "then the theory of American free governments for the States is unavailable in practice," which is contrary to the constitutional guarantee of republican government for the states (p. 21).

*Holding & disposition.*

Framing the Guarantee Clause arguments as a political question, the Court declared:

But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State... (p. 39)

The answer to the political question had already been decided by the charter government of Rhode Island. As a result, the Court held that it would abide by the Rhode Island Supreme Court's decision "that the charter government was the lawful and established government of the State during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment" (p. 39). According to Chief Justice Taney:

The question relates, altogether, to the constitution and laws of that State [Rhode Island]; and the well settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State. (p. 40)

Due to the state of martial law having been declared by the charter government of Rhode Island, Borden was "acting under military orders" and was "justified in breaking and entering the plaintiff's house" (p. 45).

*Court's rationale.*

Chief Justice Taney delivered the opinion. The question raised by the plaintiff, which government is legal, is a political question, not a judicial one. None of the state courts have recognized this question as a judicial one. Since the Declaration of Independence, "the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision" (p. 39).

Furthermore, the Supreme Court of Rhode Island, affirming the conviction of Thomas Dorr for treason, had ruled that the political power, according to the laws and institutions of the state, had recognized the charter government as being "the lawful and established government of the State during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment" (p. 39).<sup>24</sup> The legal question, then, had already been answered by the Rhode Island courts. "[T]he well settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the

constitution and laws of the State” (p. 40). As a result, the Court “must therefore regard the charter government as the lawful and established government during the time of this contest” (p. 40). Since the charter government was the lawfully established government, it had the power to protect itself against insurrection and to lawfully arrest insurgents.

Finally, in dicta that was separate from the actual holding in the case, the Court discussed the Guarantee Clause. According to Chief Justice Taney, the question of legitimacy under the Guarantee Clause

rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. (p. 42)

Since the Constitution “has treated the subject as political in its nature” and has placed the power of recognizing a state government in the hands of Congress, “its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal” (p. 42). For the Court to exercise this power would be “to overstep the boundaries which limit its own jurisdiction” (p. 47). Noting that appeal had been made by the charter government to President Tyler and not to Congress for assistance in quelling a domestic rebellion, Chief Justice Taney pointed out that Congress had, by its act of February 28, 1795, given

the power of deciding whether the exigency [the need to apply to the federal government for protection against domestic violence as provided by the Guarantee Clause] had arisen upon which the government of the United States is bound to interfere ... to the President. (p. 43)

In case there was doubt, the Court cited the language of the act:

[I]n case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other State or

States, as may be applied for, as he may judge sufficient to suppress such insurrection. (p. 43)

In sum, the matter of *Luther v. Borden* was “an action of trespass ... for breaking and entering” (p. 34). Determinations regarding questions of which government is to be recognized are political questions to be answered by political institutions. Those determinations had been made by the charter government of Rhode Island, the state government recognized by the United States Government. It was the duty of the courts to take cognizance of those decisions. Therefore the dismissal of Luther’s suit by the lower court was affirmed by the Supreme Court. Much, however, would later be made of the dicta in *Luther v. Borden* regarding the Guarantee Clause by subsequent Courts. Chief Justice Taney’s “reluctance to assert judicial power in *Luther* affected the constitutional development of the Guarantee Clause for the next century” (Hall, 1992, p. 355).

#### *Concurring/dissenting opinions.*

Justice Woodbury wrote a dissenting opinion in which he concurred with the Court’s ruling that the question was political and not judicial, but he dissented over the question of martial law. At the time martial law was declared by the legislature, the government of Rhode Island was operating under the original English charter which prohibited it from violating the laws of England. Such laws would be those in existence from the time the charter was granted in 1663 and continuing forward to 1776. These laws would include Magna Charta, the Petition of Right, and the English Bill of Rights, all of which provided limits on martial law. These limits included prohibitions of being levied on entire populations, of being used only during war “waged against a public enemy, and then by the ‘military officer’ appointed to command the troops so engaged” (p. 68). The legislative act declaring martial law violated these provisions and was therefore unconstitutional. The arrest of plaintiff Luther was therefore illegal.



***Texas v. White, 74 U.S. 700 (1869).***

*Case summary.*

The dispute involved bonds that belonged to Texas prior to the Civil War that the secession government transferred to White and Charles to raise funds for the rebellion. White and Charles subsequently transferred parts of the original transaction to other defendants. After the Civil War the Reconstruction government of Texas filed suit to recover the bonds for the state and to enjoin the defendants from receiving any payment from the U.S. for any of the bonds. Defendants White and Charles argued that the action had no authority, that Texas, having seceded and not fully restored to the Union, was not “one of the United States of America” and was not “competent to file an original bill” in federal courts (p. 717).

Chief Justice Salmon Chase wrote for the 5-3 majority. States do not have a lawful right to withdraw from the Union which “was solemnly declared to ‘be perpetual’” as derived from the purpose of the Constitution, “to form a more perfect Union” (p. 725). The Court declared, “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States” (p. 725). All actions of the illegal secessionist government in Texas were null and void. Distinguishing between relations or actions and obligations, the Court declared that even after the illegal actions, “The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State” (p. 726).

Regarding the question of the right to sue, such requires a state government that is “competent to represent the state” (p. 726). The Reconstruction Acts of Congress and subsequent action by the President in appointing commanders for the military districts as stipulated by Congress established a competent government and began the duty of the United

States to re-establish “the broken relations of the State with the Union” (p. 727). Even though not fully restored to the Union, the provisional government was recognized as the legal government by both Congress and the President; therefore, “the suit was instituted and is prosecuted by competent authority” (p. 732). A decree was issued requiring that all bonds be restored to Texas. White and Charles, as well as other defendants, were enjoined from asserting any claims to the bonds.

*Significance for the guarantee clause.*

The Guarantee Clause, according to the Court in *Texas v. White*, provided the legal underpinning for the congressional Reconstruction Acts. In the aftermath of the Civil War, the Court noted that “there was no government in the State” (p. 729). Emancipation of the slaves created a “great social change” that “increased the difficulty of the situation” (p. 728). The authority to restore the State to its proper constitutional relations “was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government” (pp. 727-728). Drawing upon *Luther v. Borden*, the Court noted that “the power to carry into effect the clause of guarantee is primarily a legislative power, and resides in Congress” (p. 730). The Chief Justice quoted from the previous ruling:

Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not. (p. 730)

Chase concluded, “And, we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence...” (p. 730).

***White v. Hart, 80 U.S. 646 (1871).***

*Case summary.*

The dispute centered on the validity of a promissory note, the subject of which was a slave. The plaintiff sold the defendant a slave in February 1859 and received a promissory note that became due in March 1860 with 10% interest from the date of the note. Having not received payment the plaintiff filed suit in the Superior Court of Chattooga County. The defendant argued that the Georgia Constitution, as amended in 1868, prohibited the court from considering the matter because of the following amended clause: “Provided, that no court or officer shall have, nor shall the General Assembly give, jurisdiction to try, or give judgment on, or enforce any debt the consideration of which was a slave or the hire thereof” (p. 648). The plaintiff argued that the U.S. Constitution prohibited states from passing “any law impairing the obligation of contracts” (p. 649). The court agreed with the former argument and gave judgment for the defendant. The plaintiff then appealed to the Georgia Supreme Court, which ruled that since Georgia was “a conquered territory” when its constitution was amended under the “dictation and coercion of Congress,” and since Congress was not restricted from impairing contracts, the resulting state constitution was in reality a congressional action (p. 649). The Georgia Supreme Court affirmed the lower court’s judgment. White then applied for a writ of error to the U.S. Supreme Court, which was granted.

Justice Swayne wrote for the majority. The action of Georgia in amending its constitution was both voluntary and valid, and it was accepted and approved by Congress as such. Both during and after the rebellion, the “constitutional duties and obligation” of the rebellious states “remained unaffected by the rebellion” (p. 646). The Court observed, “It is well settled by the adjudications of this court, that a State can no more impair the obligation the obligation of a contract by adopting a constitution than by passing a law” (p. 652). Since slavery

was legal at the time of the contract, the contract was legal. The Court noted the inseparability of contract validity and the remedy to enforce its provisions, both of which are “parts of the obligation which is guaranteed by the Constitution against invasion. Accordingly, whenever a State, in modifying any remedies to enforce a contract, does so in a way to impair substantial rights, the attempted modification is within the prohibition of the Constitution, and to that extent void” (p. 647). Georgia’s constitutional amendment “had no effect on a contract made previous to it, though the consideration of the contract was a slave” (p. 647). The Court reversed in favor of the plaintiff and remanded the case to the Georgia Supreme Court “with directions to proceed in conformity to this opinion” (p. 654).

The Chief Justice dissented, noting that slavery and slave contracts “were annulled by the thirteenth amendment of the Constitution which abolished slavery” (p. 663). He also noted that the Fourteenth Amendment forbade “compensation for slaves emancipated by the thirteenth...” (p. 664). Because the supreme law of the land acts on slavery and on slave contracts, state actions in accordance with the Constitution “cannot be held void as in violation of the original Constitution, which forbids the States to pass any law violating the obligation of contracts” (p. 664).

*Significance for the guarantee clause.*

The action of Congress, in accepting and approving Georgia’s amended constitution that resulted in full restoration to the Union, constituted a political act, according to *White v. Hart*. Citing *Luther v. Borden*, the Court observed: “The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it” (p. 649).

***City of Rome v. United States, 472 F.Supp. 221 (1979).***

*Case summary.*

The dispute centered on the requirements of the Voting Rights Act of 1965 pursuant to the Fifteenth Amendment. The City of Rome, Georgia brought the action in the U.S. District Court, District of Columbia as specified by the Voting Rights Act provisions governing disagreements between voting jurisdictions and the U.S. Attorney General. The U.S. Attorney General did not approve the city's plan of majority vote and run-off provisions because it had the effect of discriminating against black voters. Upon the refusal of the Attorney General to reconsider his position, the city government initiated the legal challenge. The city argued that the Fifteenth Amendment required only a showing that the purpose was to discriminate, and that requirements centering on effect went beyond congressional authority, according to the Fifteenth Amendment.

Circuit Judge McGowan wrote the opinion for the three-judge panel. According to the ruling, "Congress was within its broad enforcement power ... when it outlawed voting changes discriminatory in effect only" (p. 237). The opinion quoted Chief Justice Warren's citation in *South Carolina v. Katzenbach*, 383 U.S. at 327, of the Supreme Court's ruling in *Ex parte Virginia*, 100 U.S. at 345-46:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion if not prohibited, is brought within the domain of congressional power. (pp. 237-238)

According to a finding of the Court, plurality voting in Rome, as opposed to majority voting with run-off requirements, would have resulted in a black candidate being elected to the city's school board. Finding that the effect of Rome's voting requirements was discriminatory, the Court ruled against the plaintiffs and for the defendant.

*Significance for the guarantee clause.*

Although not central to the legal question under consideration, the Court ruled against the plaintiff's assertion that its rights under the Tenth Amendment and the Guarantee Clause were violated by the Voting Rights Act as passed by Congress. The Court dismissed the Tenth Amendment argument by citing the Supreme Court's ruling in *Katzenbach*, 383 U.S. at 324:

As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. ...The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power. (pp. 240-241).

Regarding the Guarantee Clause argument, the District Court cited *Luther v. Borden* as determining that such an issue was "generally not justiciable in federal courts" (p. 241). But, the Court continued, the Guarantee Clause actually serves to provide the justification for "an affirmative exercise of Congress' power" in the Voting Rights Act, not a prohibition to such action (p. 241). According to the Court, the purpose of the Voting Rights Act was "to guarantee to the covered jurisdiction one essential feature of a truly republican form of government – i.e., the equal right of any citizen, irrespective of race or color, to exercise the franchise" (p. 241).

**The guarantee clause requires federal intervention to secure protection against abusive state government.**

*Barron v. Baltimore*, 32 U.S. 243 (1833).

*Case summary.*

The facts of the case originated in Baltimore where suit was brought by a wharf owner who claimed the city owed him for economic losses resulting from the city's actions to divert streams which resulted in silting of the harbor whereby "the water was rendered so shallow that it ceased to be useful for vessels of any important burthen" (p. 180). This resulted in lost income and a useless wharf that previously had enjoyed "the deepest water in the harbour" (p. 243).

Barron claimed that his property (his ability to operate his wharf business) was taken without just compensation as required by the Fifth Amendment to the U.S. Constitution. Attorneys for the mayor and city council of Baltimore argued that the city's actions were "justified under the authority they deduced from the charter of the city, granted by the legislature of Maryland..." (p. 244).

Baltimore County Court found for plaintiff Barron and rendered a verdict of \$4,500 against the city. The court of appeals reversed the decision of the county court and didn't remand the case for further trial. Barron, the defendant in the court of appeals, was granted a writ of error to the U.S. Supreme Court.

Chief Justice John Marshall delivered the unanimous decision of the Court. First, he observed that "[t]he constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states" (p. 247). Given this understanding, Marshall next stated that the "fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested" (p. 247). The Chief Justice then made the following observation. "Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention" (p. 249). He then delivered the ruling of the Court:

We are of the opinion that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation of the exercise of power by the government of the United States, and is not applicable to the legislation of the states. We are therefore of the opinion that there is no repugnancy between the several acts of the general assembly of Maryland ... and the constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed. (p. 249)

*Significance for the guarantee clause.*

The significance for the Guarantee Clause is that *Barron v. Baltimore* withdraws the individual rights guaranteed under the Bill of Rights from effective judicial interpretation of what constitutes a republican government as applied to state governments. Such would remain the case until the adoption of the post-Civil War amendments.

***Minor v. Happersett, 88 U.S. 162 (1875).***

*Facts & procedural history.*

Women's suffrage constitutes the heart of this legal issue. Although plaintiff's argument centered on the Fourteenth Amendment, prior to making its ruling the Court discussed its understanding of the meaning of republican government as presented by the Guarantee Clause. Given the history of the Fourteenth Amendment, it is not surprising that early attempts by the judiciary to rule on the Fourteenth Amendment involved discussion of the Guarantee Clause as it provided the basis for both the Civil War amendments and the Reconstruction Acts.

The abolitionists insisted that the guarantee clause empowered Congress to "dictate the form of [a state's] fundamental code or constitution, with a view of rendering it consistent with ... [a republican] form of government." (12 Cong. Deb. 4269 (1836) [covering 1824-1837] (Hard). They were convinced that such a government secured the rights of "life, liberty, and the pursuit of happiness," and was founded on the assumption that "all men are created equal," and that "government derives its just powers from the consent of the governed." See 12 Cong. Deb. 4271-72 (1836) [1824-1837] (Hard). (Cited in Bonfield, 1962, pp. 531-532)

With the abolitionists in control of Congress immediately following the conclusion of the Civil War, this argument was resurrected. As a professor of constitutional law noted:

The guarantee clause had been mentioned preciously as a possible source of congressional power in this area. ...As a result, when the Committee on Reconstruction reported out the fourteenth amendment, it resurrected their prior reliance on article IV, section 4. It was from that provision, it



concluded, that Congress derived the power to reconstruct the southern states and assure equal rights... (Bonfield, 1962, January, p. 539)

Mrs. Virginia Minor, “a native born, free, white citizen of the United States and of the State of Missouri, over the age of twenty-one years” attempted to register to vote in Missouri on October 15, 1872 for the general election scheduled to be held in November 1872 (p. 163). Happersett, the voter registrar, refused to register Mrs. Minor because “she was not a ‘male citizen of the United States,’ but a woman” (pp. 163-164).

Mrs. Minor filed suit against Happersett in “one of the inferior State courts of Missouri” for “willfully refusing to place her name upon the list of registered voters, by which refusal she was deprived of her right to vote” (p. 164). As the Court records note, “The registrar demurred...” (p. 164). The unabridged *Webster’s Third New International Dictionary* defines demurrer as “a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim (the opposite party’s claim)” (Gove, p. 601). The lower court sustained Happersett’s demurrer and ruled in his favor. On appeal, the Supreme Court of Missouri affirmed the demurrer. Mrs. Minor applied for and received a writ of error from the United States Supreme Court.

*Legal question.*

Is the right to vote one of the necessary privileges of citizenship? Does the Fourteenth Amendment grant suffrage to women of legal age who meet residency requirements?

*Legal reasoning of opposing parties.*

The Court records noted that “No opposing counsel” appeared for Happersett at the Court’s hearing on the issue (p. 164).

Minor’s legal arguments began with the assumption that women were citizens and that as citizens, they were “entitled to any and all the ‘privileges and immunities’ that belong to such

position” (p. 164). The legal argument next asserted that “the elective franchise is a ‘privilege’ of citizenship” and “of the right of the citizen to participate in his or her government” (p. 164). Minor’s attorneys further noted that “the Constitution of the United States” as amended by the Fourteenth Amendment “expressly declares that ‘no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States’” (p. 164). Minor’s legal argument concluded by noting that “the provisions of the Missouri constitution and registry law ... are in conflict with and must yield to the paramount authority of the Constitution of the United States” (p. 164).

*Holding & disposition.*

Citizenship does not necessarily include the right of suffrage. “Neither the Constitution nor the fourteenth amendment made all citizens voters” (p. 163). “[T]he constitutions and laws of the several States which commit that important trust [the right to vote] to men alone are not necessarily void” (p. 178). Thus the Court “affirmed the judgment” of the Missouri Supreme Court (p. 178).

*Court’s rationale.*

Chief Justice Waite delivered the Court’s opinion. The Court defined citizenship as “conveying the idea of membership of a nation, and nothing more” (p. 166). According to the Court, “For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage” (p. 177). In the Court’s reasoning, citizenship and suffrage were separate entities. In this light, the Fourteenth Amendment had no effect upon citizenship:

The fourteenth amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The

amendment prohibited the State, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption. (p. 170)

According to the Court, “The Constitution does not define the privileges and immunities of citizens” (p. 170). The Court next noted that the “United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters” (p. 170). The Court continued:

When the Federal Constitution was adopted, all the States, with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of these constitutions we find that in no State were all citizens permitted to vote. Each State determined for itself who should have that power. (p. 172)

Regarding the issue of women’s suffrage, the Court observed, “Women were excluded from suffrage in nearly all the States by the express provisions of their constitutions and laws” (p. 176). The Court further noted, “No new State has ever been admitted to the Union which has conferred the right of suffrage upon women, and this has never been considered a valid objection to her admission” (p. 177). The Court next referenced the condition of the southern states following the Civil War and the impact of the Reconstruction Acts upon their governments regarding suffrage.

Since then the governments of the insurgent States have been reorganized under a requirement that before their representatives could be admitted to seats in Congress they must have adopted new constitutions, republican in form. In no one of these constitutions was suffrage conferred upon women, and yet the States have all been restored to their original position as States in the Union. (p. 177)

Regarding the requirements of the Guarantee Clause, the Court observed, “All these several provisions of the Constitution must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances” (p. 175). The Court continued:

The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. These governments the Constitution did not change. They were accepted precisely as they were... Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution. (pp. 175-176)

The Court next linked its previous analysis of the states' constitutional positions regarding women's suffrage with the provisions of the Guarantee Clause.

As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters. (p. 176)

Before announcing the holding of the case, the Court concluded its reasoning by briefly noting the Court's legal limitations and obligations:

If the law is wrong, it ought to be changed; but the power for that is not with us. ...No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a State to withhold. (p. 178)

*Concurring/dissenting opinions.*

There were no dissenting opinions as the decision of the Court was unanimous.

***United States v. Cruikshank, 92 U.S. 542 (1876).***

*Case summary.*

The case originated in the U.S. Circuit Court for the District of Louisiana and was brought on behalf of two U.S. citizens "of African descent and persons of color," Levi Nelson

and Alexander Tillman. Cruikshank and other white citizens had banded together to harass and frighten black citizens from exercising their rights, particularly their right to vote. Cruikshank et al were charged with violating the congressional Enforcement Act designed to give effect to constitutional guarantees. In what was to become a pattern of judicial noninterference with discriminatory actions against black citizens, the Supreme Court denied federal jurisdiction, which would not be again asserted until well into the twentieth century of jurisprudence. Rights guaranteed by the Bill of Rights prohibit violations by the federal government, not state governments. “For their protection in its enjoyment, therefore, the people must look to the States” (p. 552). Taking a limited view of federal powers, the Court declared:

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or to the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States. (p. 551)

With regards to the rights of due process and equal protection of the laws guaranteed by the Fourteenth Amendment, such prohibitions exist against state governments, not individual citizens.

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. (p. 554)

*Significance for the guarantee clause.*

Sadly enough, in the Court’s reasoning in *United States v. Cruikshank*, the Guarantee Clause was trumped by the States’ Rights argument as grounded in the Tenth Amendment. According to the opinion written by Chief Justice Waite, the duty for maintaining citizens rights

under a republican government resided in the states' powers. The federal government was limited only to ensuring that the states did not infringe upon federal rights. It was powerless to act against individual citizens.

The fourteenth amendment ... does not ... add any thing to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty. (pp. 554-555)

According to the Court, the federal government could not take action to ensure that individual citizens respected the rights of others as guaranteed under a republican form of government. Such was a state responsibility.

***In re Duncan, 139 U.S. 449 (1891).***

*Case summary.*

This case reached the Supreme Court on appeal from the U.S. Circuit Court for the Western District of Texas. Dick Duncan had been tried, convicted, and sentenced to death for first-degree murder by the State of Texas. He filed for a writ of *habeas corpus* with the court from which the appeal was granted, arguing that he had been denied due process and the equal protection of the laws as guaranteed by the Fourteenth Amendment because of alleged irregularities in the passage of Texas' penal code. The federal Circuit Court, after conducting a hearing on the application, "dismissed the petition and denied the writ," whereupon the petitioner appealed. Chief Justice Fuller wrote the Court's opinion. After citing three Texas court decisions affirming the validity of the state's penal code, the Court observed:

It is unnecessary to enter upon an examination of the rulings in the different States upon the question whether a statute duly authenticated, approved and

enrolled can be impeached by resort to the journals of the legislature or other evidence, for the purpose of establishing that it was not passed in the manner prescribed by the state constitution. The decisions are numerous, and the results reached fail of uniformity. The courts of the United States necessarily adopt the adjudication of the state courts on the subject. (pp. 455-456)

The Court affirmed the judgment of the Circuit Court, observing that it was for the state to determine “whether certain statutes have or have not binding force” and declaring that “no Federal question” had been raised which would give “the courts of the United States jurisdiction (p. 462).

*Significance for the guarantee clause.*

The Court, in reaching its decision, commented on the Guarantee Clause as providing the constitutional authority for the federal courts to decline jurisdiction when no federal question is raised. Before citing *Luther v. Borden*, the Court observed:

By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities. (p. 461)

***Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135 (1892).***

*Case summary.*

The issue originated in Nebraska and involved citizenship with a resulting effect upon eligibility to hold state office. Boyd, born in Ireland of parents who immigrated to Ohio when he was ten, was elected governor of Nebraska. Thayer, the previous governor who hadn’t run for re-election, sought to invalidate the election results by claiming that Boyd was not a citizen because first, his immigrant father didn’t get citizenship papers until after Boyd turned twenty-

one and second, because Boyd did not apply for citizenship after reaching legal age. Because the state attorney general would not prosecute the case, Thayer obtained permission from the Nebraska Supreme Court “to file an information against James E. Boyd to establish the relator’s right to the office of governor of that State, and to oust the respondent therefrom” (p. 137).

Boyd responded that his father “in open court declared it to be his *bona fide* intention to become a citizen of the United States” on March 5, 1849, and thereafter exercised full rights of citizenship, including being elected to public office (p. 139). Believing that he was a citizen by virtue of his father’s declaration, Boyd asserted that he voted in Ohio before moving to Iowa and then on to the Nebraska Territory as a young man where he had resided continuously since August, 1856. During his Nebraska residency Boyd had been elected county clerk, had served as a U.S. soldier on Nebraska’s frontier, had been elected to the territorial legislature, had also been elected to serve in two state constitutional conventions, and had served two terms as Omaha’s mayor before being elected governor. Boyd had continuously exercised his right to vote during his tenure in Nebraska. After learning that his citizenship was being questioned, Boyd had gone before the U.S. District Court for the District of Nebraska “for the purpose of removing all doubts that might arise” concerning his citizenship (p. 149). The U.S. District Court “found, determined and adjudged that he was in fact and law a full citizen of the United States” (p. 149).

The Nebraska Supreme Court, with two of three justices concurring while one dissented, ruled that Boyd was not a U.S. citizen as required by the state constitution because his father hadn’t received naturalization papers until after Boyd had turned twenty-one. Accordingly the court issued a “judgment of ouster” against Boyd as well as an order reinstating Thayer to the governor’s office (p. 150). Boyd appealed on a writ of error to the U.S. Supreme Court.



The Court began by citing Justice Waite's observation in *United States v. Cruikshank*, in which he noted, "Citizens are the members of the political community to which they belong" (p. 158). The Court asserted its jurisdiction because a defense had been "interposed under the Constitution or laws of the United States" that "involved the denial of a right or privilege under the Constitution and laws of the United States" and had been overruled by "the highest court of the State" (p. 161).

According to the Court, the critical question involved congressional authority over the Nebraska Territory before Nebraska became a state because Boyd had moved to and resided in the Nebraska Territory. "What the State had power to do after its admission is not the question. Before Congress let go its hold upon the Territory, it was for Congress to say who were members of the political community" (p. 175). The Court noted that the "organic law under which the Territory of Nebraska was organized" stipulated that "every free white male inhabitant above the age of twenty-one years who shall be an actual resident of said Territory, and shall possess the qualifications hereinafter prescribed, shall be entitled to vote... and shall be eligible to any office within the said Territory" (pp. 170-171). Also, the act of Congress "to enable the people of Nebraska to form a constitution and state government, and for the admission of such State into the Union on an equal footing with the original states" stipulated that "the inhabitants of ... the Territory of Nebraska ... are hereby authorized to vote for and choose representatives to form a convention..." (pp. 172-173). Finally, the Court cited another ruling by Chief Justice Waite, this time from *Minor v. Happersett* in which he observed, "Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became *ipso facto* a citizen – a member of the nation created by its adoption" (p. 176). Because new states were

admitted to the Union “on an equal footing with the original States, in all respects whatever,” including “equality of constitutional right and power” (p. 170), Boyd

was within the intent and meaning, effect and operation of the acts of Congress in relation to citizens of the Territory, and was made a citizen of the United States and of the State of Nebraska under the organic and enabling acts and the act of admission. (p. 179)

The Court ruled that Boyd was a citizen, reversed the decision of the Nebraska Supreme Court, and remanded “the cause” to be “proceeded in according to law and in conformity with this opinion” (p. 182).

*Significance for the guarantee clause.*

Although the Guarantee Clause was not specifically mentioned in this case except in the dissenting opinion, the contents of the case involve the criteria for this section, namely, that federal intervention was required in order to uphold the form of republican government. Boyd had been elected governor by the citizens of Nebraska and had been recognized as a citizen by a federal court. The U.S. Supreme Court intervened when the Nebraska Supreme Court ruled to oust a duly elected official because the state didn’t recognize Boyd’s citizenship.

Justice Field dissented from the Court majority because he viewed the Tenth Amendment as putting a limit upon the use of the Guarantee Clause to justify federal interventions in state matters.

In his opinion the Court lacked jurisdiction to review the Nebraska Supreme Court’s decision, and thus its ruling constituted unjustified interference in the affairs of a “qualified” sovereignty that possessed “only the powers of an independent political organization which are not ceded to the general government or prohibited to them by the Constitution” (p. 182). He continued by observing that “the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, ‘reserved,’ are as independent of the general government as

that government within its sphere is independent of the States” (p. 182). Justice Field further noted that the U.S. government’s

power of interference with the administration of the affairs of the State and the officers through whom they are conducted extends only so far as may be necessary to secure to it a republican form of government, and protect it against invasion, and also against domestic violence on the application of its legislature, or of its executive when that body cannot be convened. Const. Art. IV, sec. 4. Except as required for these purposes, it can no more interfere with the qualifications, election and installation of the state officers, than a foreign governments. And all attempts at interference with them in those respects ... are in my judgment so many invasions upon the reserved rights of the States and assaults upon their constitutional autonomy. (p. 183)

***Taylor v. Beckham, 178 U.S. 548 (1900).***

*Facts & procedural history.*

This is a highly interesting case regarding federalism because of, first, the intertwining of the Guarantee Clause and of the Due Process Clause of the Fourteenth Amendment, and second, the dissent offered by Justice John Marshall Harlan that prefigured modern legal reasoning. Because of the Court’s previous interpretation of the Guarantee Clause in *Luther v. Borden*, the Court’s majority declined to take jurisdiction. However, for Justice Harlan, it was the Guarantee Clause that made the Due Process Clause of the Fourteenth Amendment and that provided the basis for his dissent.

The facts of the case originated in the gubernatorial election of 1899 in Kentucky. The day before the election the governor (who was not running for re-election) called out the troops in Louisville and stationed them at polling places to maintain order, but later alleged for the purpose of intimidating Democratic voters. It was later alleged that the Louisville and Nashville Railroad Company and other corporations intimidated their employees under threat of dismissal from work into voting for the Republican candidates.

Following the election the State Board of Election Commissioners canvassed the election returns as required by Kentucky statute and determined that the Republican ticket of William S. Taylor and John Marshall received a higher number of votes than did the Democratic ticket of William Goebel and J.C.W. Beckham. The State Board of Election Commissioners accordingly awarded certificates of election to Taylor and Marshall on December 9, 1899, whereupon they were sworn into office on December 12, 1899.

Within thirty days of the announced results, the losers (Goebel & Beckham) of the popular election filed notice as required by Kentucky law that they would contest the results of the election. Kentucky statutes required that each chamber of the General Assembly meet in legal session to appoint Boards of Contests to try the election contests. After being duly sworn, the Boards met to separately try the contests, make a decision, and report that decision to the respective chamber that appointed the Board. Each board reached the same conclusion which was the opposite of the election results as determined previously by the State Board of Election Commissioners, namely that the Democratic candidates, Goebel and Beckham, won the election.

Before the results could be reported to the respective legislative bodies, the Democratic candidate for governor, William Goebel, was shot on January 30, 1900. On January 31 the Republican governor-elect, William Taylor, declared that “a state of insurrection existed at Frankfort” and adjourned the General Assembly until February 6, at which time it was to meet not at the State House, but instead at London, Kentucky (p. 562).

The Democratic members of the General Assembly defied the Republican governor’s order and met on February 2 in the Capitol Hotel in Frankfort since the State House was occupied by troops who prohibited legislators from entering. Each house separately approved and adopted the reports of the contest boards, allegedly without notifying the Republican

legislators. Meeting in joint session, both houses formally adopted the reports and declared that the Republican candidates, Goebel and Beckham, were the “duly elected Governor and Lieutenant Governor” (p. 562). Both Goebel and Beckham took the oath of office on that same day, February 2.

The next day, February 3, Goebel died of the wound received on January 30. As the declared Lieutenant Governor, Beckham assumed the office of Governor upon Goebel’s death. Taylor and Marshall, the State Board-certified and duly sworn candidates, refused to relinquish their offices and the records maintained by each office. Whereupon Beckham, the legislatively-declared and duly sworn candidate, filed suit in the Circuit Court of Jefferson County in the Commonwealth of Kentucky seeking a judgment of ouster against the defendants, Taylor and Marshall.

The Circuit Court ruled that the determination of who won the contested election was conducted according to the laws of the state, that both Goebel and Beckham were duly sworn, and that upon Goebel’s death, the law required Beckham as Lieutenant Governor to assume the duties of Governor. Based upon its findings the Circuit Court issued a judgment of ouster against the defendants, Taylor and Marshall. Taylor and Marshall appealed the decision to the Court of Appeals of Kentucky. The Court of Appeals affirmed the judgment of the Circuit Court by a 6-1 majority. Specifics of their ruling are discussed in the “rationale” section following presentation of the legal questions and arguments since it appears that the Kentucky Court of Appeals and the U.S. Supreme Court covered much of the same ground. Subsequently the Supreme Court agreed to hear the case under a writ of error.

*Legal questions.*

First, were the actions of the Boards of Contests and of the General Assembly that determined Goebel and Beckham as winners of the election conducted in a legal manner? Second, did the actions of the Boards of Contests and of the General Assembly deprive Taylor and Marshall of a property right without due process in violation of the Fourteenth Amendment? Third, in overturning the will of the voters as determined by the State Board of Election Commissioners, did the Boards of Contests and the General Assembly deprive the people of Kentucky the “benefit of a republican form of government” without due process of law and thus violate “provisions of the fourth section of the fourth article of the ... Constitution” as well as the Fourteenth Amendment (p. 557)?

*Legal reasoning of opposing parties.*

The legal reasoning derives from that used by each party in both proceedings before the Kentucky high court and the U.S. Supreme Court. Plaintiff Beckham argued that the laws of Kentucky were followed in determining the winner of the election for governor and lieutenant governor. Plaintiff also argued that the meetings of the General Assembly were legal because the governor possessed no power to disband the legislature or to prohibit it from meeting. The “powers of Taylor as Governor and of Marshall as Lieutenant Governor immediately ceased on the determination of the contest by the General Assembly” (p. 551). However, instead of relinquishing their offices as required by state law, Taylor and Marshall “usurped the said offices” and “refused to surrender the records, archives, journals and papers pertaining to the office of Governor, and the possession of the executive offices in the Capitol in the city of Frankfort” (p. 551). Plaintiff Beckham sought a judgment of ouster against the defendants.

Defendants Taylor and Marshall argued that the actions of the Boards of Contests and the General Assembly were “the result of a conspiracy ... to wrongly and unlawfully deprive

contestees of their offices” (p. 552). In support of this position, they claimed that the actions of the Boards of Contest and the General Assembly did not follow state laws in that members of the Boards were not “fairly drawn by lot, as required by law,” but were instead selected according to their political allegiance, that the “Senate lacked a quorum at the time of the pretended adoption of the Contest Boards’ reports,” and that the meeting of the General Assembly was illegal because Taylor, in his capacity as governor, “refused to permit the members of the General Assembly to meet as the General Assembly at Frankfort, because he had preciously adjourned the General Assembly to meet on February 6 at London, in Laurel County” (p. 552). Defendants further contended that the meetings of the General Assembly were void because

the said meetings were held secretly, without any notice to any of the Republican members of the General Assembly and without any notice to either of these defendants that such meetings were to be held, and without any opportunity either to the said Republican members or any of them to be present, or any opportunity for either of these defendants to be present at such meetings... (p. 558)

Also, the defendants argued, “the entries on the Journals of the General Assembly were false and fraudulent, and made in pursuance of said conspiracy...” (p. 552). Finally, Taylor and Marshall noted, having received certificates of election from the State Board of Election Commissioners, defendants received a property interest in their respective offices and “became charged with an express public trust for the benefit of the people of the State of Kentucky” (p. 557). If deprived of these offices by the illegal actions of the General Assembly,

Defendants will be thereby deprived by the State of Kentucky of their property without due process of law and both they and the people of Kentucky, and the qualified voters thereof will be deprived of their liberty without due process of law, and will be denied the benefit of a republican form of government, all of which is contrary to the provisions of the fourth section of the fourth article of the said Constitution and to the Fourteenth Amendment ... (p. 557)

Taylor and Marshall requested the Court to dismiss the case, to adjudge Beckham a usurper, and to issue a ruling that the defendants (being also the appellants) were the legal governor and lieutenant governor of Kentucky.

*Holding & disposition.*

The Supreme Court dismissed the writ of error, thus affirming the judgment of the Kentucky Court of Appeals.

*Court's rationale.*

Kentucky's high court, the Court of Appeals, ruled that Taylor's action to dismiss the legislature did not meet the state's constitutional requirements, voided the attempt by Taylor as governor-elect to do so, and declared the meeting of the legislature at the Capitol Hotel in Frankfort to be a lawful meeting. On the question of the validity of the Journals of the General Assembly, the court ruled

that evidence *aliunde* could not be received to impeach the validity of the record prescribed by the constitution as evidence of the proceedings of the General Assembly, and that the court was without jurisdiction to go behind the record thereby made. (p. 565)

Regarding the Fourteenth Amendment, the Court of Appeals determined that public office was not property, but "a matter of state policy" (p. 567). If not property, the "determination of the result of an election is purely a political question," and such proceedings are "not in violation of the Fourteenth Amendment" (p. 567).

Chief Justice Fuller wrote the Supreme Court's opinion upholding the decision reached by the Kentucky Court of Appeals. In affirming the Kentucky court's judgment that a property right was not involved, he noted that "the right to hold the office of Governor or Lieutenant Governor of Kentucky was not property in itself" because it was "created by the state Constitution, was conferred and held solely in accordance with the terms of that instrument and



laws passed pursuant thereto” (p. 575). Justice Fuller further substantiated such a position by discussing two previous rulings and citing others to the same effect. He concluded, “The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such” (p. 577). In one additional stroke the Supreme Court both upheld the Court of Appeals decision not to inquire into the procedures of the General Assembly and ruled that such action did not violate the Fourteenth Amendment.

It is clear that the judgment of the Court of Appeals in declining to go behind the decision of the tribunal vested by the state constitution and laws, with the ultimate determination of the right to these offices, denied no right secured by the Fourteenth Amendment. (p. 578).

And then the Supreme Court dealt with the argument intertwining the Fourteenth Amendment and the Guarantee Clause.

But it is said that the Fourteenth Amendment must be read with Section 4 of article IV of the Constitution... It is argued that when the State of Kentucky entered the Union, the people “surrendered their right of forcible revolution in state affairs,” and received in lieu thereof a distinct pledge to the people of the State of the guarantee of a republican form of government, and of protection against invasion, and against domestic violence; that the distinguishing feature of that form of government is the right of the people to choose their own officers for governmental administration; that this was denied by the action of the General Assembly in this instance; and, in effect, that this court has jurisdiction to enforce that guarantee, albeit the judiciary of Kentucky was unable to do so because of the division of the powers of government. And yet the writ before us was granted under § 709 of the Revised Statutes to revise the judgment of the state court on the ground that a constitutional right was decided against by that court. (p. 578)

At this point, the Chief Justice cited *Luther v. Borden*. “It was long ago settled that the enforcement of this guarantee belonged to the political department” (p. 578). After extensively reviewing that ruling and subsequent uses of the *Luther* ruling, the Chief Justice delivered the Court’s rational for dismissing the writ of error.

We must decline to take jurisdiction on the ground of deprivation of rights embraced by the Fourteenth Amendment, without due process of law, or of

the violation of the guarantee of a republican form of government by reason of similar deprivation. (p. 580)

*Concurring/dissenting opinions.*

Two justices, Brewer and Brown, wrote a dissenting opinion stating their agreement with the result, but differing in the rationale they used. Justice Harlan dissented with both the result and the legal reasoning of the majority decision.

To this observer, it seemed as if the court majority and Justice Harlan had listened to separate legal arguments. Justice Harlan disagreed completely with the court majority. He disagreed with the Court's interpretation of the facts and with the Court's ruling, both of which, according to Harlan, violated existing case, statutory, and constitutional law.

Harlan began his dissent by observing that the certificates of election awarded Taylor and Marshall by the appropriate state officials following the election established a *prima facie* right to office. Justice Harlan next stated that Taylor and Marshall could not be deprived of that right except through, first, a challenge and hearing of the dispute according to law, and second, evidence being presented that proved someone else was entitled to office. After reviewing Kentucky's statutory and case law regarding contested elections, Harlan commented that the members of the Board of Contest were required to settle the dispute according to the evidence presented. The Board was also required to present these evidentiary facts to the legislature for a final determination. According to Harlan, "If no proof was laid before (the legislature), then the *prima facie* right of the incumbent based upon the certificate awarded to him, must prevail" (p. 590).

Justice Harlan next observed that the Board of Contest presented a report to the legislature giving their opinion that Goebel and Beckham had been elected, not Taylor and Marshall. Harlan noted that the Board's report contained neither a summary of the evidence nor

any particular evidentiary citations upon which the Board based its statement that Goebel and Beckham were the legitimate winners of the gubernatorial contest. Harlan next cited Kentucky statutes that required members of the Board of Contest to “give true judgment *according to the evidence*” (Emphasis J. Harlan) (p. 590). Without examining any evidence or requiring that any evidence be presented, Harlan noted, the legislature approved the Board’s report and declared, in separate resolutions, that Goebel and Beckham were the legal elected governor and lieutenant governor respectively. As Harlan remarked, “The evidence renders it clear that the declaration that (Goebel) had received the highest number of legal votes cast was in total disregard of the facts” (p. 607). According to Justice Harlan, the foregoing constituted the critical facts of the case upon which the lawsuit was based.

Justice Harlan next reviewed four previous Court rulings in support of his contention that the Court’s current majority had “departed from the rulings of this court in former cases” when it dismissed “the writ of error for want of jurisdiction” (p. 592). Harlan concluded his review by stating:

It thus appears that in four cases, heretofore decided, this court has proceeded upon the ground that to deprive one without due process of law of an office created under the laws of a State, presented a case under the Fourteenth Amendment to the Constitution of the United States of which we could take cognizance and inquire whether there had been due process of law. (p. 597)

Harlan next contrasted his interpretation of constitutional and case law with that of the Court’s majority opinion, using language that gave rise to a sense of irony.

When the Fourteenth Amendment forbade any State from depriving any person of life, liberty or property without due process of law, *I had supposed* that the intention of the People of the United States was to prevent the deprivation of any legal right in violation of the fundamental guarantees inhering in due process of law. The prohibitions of that amendment, *as we have often said*, apply to all the instrumentalities of the State, to its legislative, executive and judicial authorities... (Emphasis added) (p. 599)

Harlan continued:

It is said that the courts cannot, in any case, go behind the final action of the legislature to ascertain whether that which was done was consistent with rights claimed under the Federal Constitution. If this be true then it is in the power of the state legislature to override the supreme law of the land. (p. 600)

Justice Harlan then cited a previous Supreme Court ruling that stood contrary to the interpretation rendered by the Court's majority.

The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state ... to see that no right secured by the supreme law of the land is impaired or destroyed by legislation. ...[T]he liberty which is enjoyed under (our institutions) depends, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land. *Smyth v. Ames*, 169 U.S. 466. (p. 601)

Continuing, in a somewhat ironic vein of portraying himself as a somewhat naïve student with differing (and therefore mistaken) views that starkly contrast with the majority of his more learned brethren, Harlan observed:

*I had supposed* that the principles announced in the cases above cited were firmly established... *It seems however* – if I do not misapprehend the scope of the decision now rendered – that under our system of government the right of a person to exercise a state office to which he has been lawfully chosen by popular vote ... may be taken from him by the arbitrary action of a state legislature, in utter disregard of the principle that Anglo-Saxon freemen have for centuries deemed to be essential in the requirement of due process of law – a principle reaffirmed in the Kentucky Bill of Rights, which declares that “absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a Republic, not even in the largest majority.” (Emphasis added) (p. 601)

Justice Harlan concluded his review of the contrasts between his interpretation of case and constitutional law and that of the Court's majority by declaring, “I cannot assent to the

interpretation now given to the Fourteenth Amendment” (p. 601. After further buttressing his opinion, Harlan added to his previous conclusion:

I go farther. The liberty of which the Fourteenth Amendment forbids a State from depriving any one without due process of law is something more than freedom from the enslavement of the body or from physical restraint. In my judgment the words “life, liberty or property” in the Fourteenth Amendment should be interpreted as embracing every right that may be brought within judicial cognizance, and therefore no right of that kind can be taken in violation of “due process of law.” (pp. 602-603)

It is in discussing liberty that Justice Harlan notes the connection between the Guarantee Clause and the Fourteenth Amendment.

The liberty of which I am speaking is that which exists, and which can exist, only under a republican form of government. “The United States,” the supreme law of the land declares, “shall guarantee to every State in the Union a republican form of government.” (p. 604)

Justice Harlan continued further:

The constitution of Kentucky expressly forbids the exercise of absolute and arbitrary power over the lives, liberty or property of freemen. And that principle is at the very foundation of the Government of the Union. ...The doctrine of legislative absolutism is foreign to free government as it exists in this country. The cornerstone of our republican institutions is the principle that the powers of government shall, in all vital particulars, be distributed among three separate coordinate departments, legislative, executive and judicial. And liberty regulated by law cannot be permanently secured against the assaults of power or the tyranny of a majority, if the judiciary must be silent when rights existing independently of human sanction, or acquired under the law, are at the mercy of legislative action taken in violation of due process of law. (pp. 608-609)

In concluding his dissent, Justice Harlan opined that the writ of error should have been sustained and that a judgment should have been issued declaring that Taylor’s and Marshall’s due process rights guaranteed by the Fourteenth Amendment had been violated by the actions of the Kentucky legislature.

***South Carolina v. United States, 199 U.S. 437 (1905).***

*Case summary.*

The central issue was whether or not the United States had the authority to tax the State of South Carolina's liquor business. The case arrived at the Court on appeal from the Court of Claims which had conducted a hearing, made findings of fact, and ruled in favor of the federal government. South Carolina argued, "The Constitution contains no grant of power to Congress ... to tax a State or its means and instrumentalities of government" (p. 440). The state continued, "[T]he exercise by Congress of a power not expressly or impliedly granted by the Constitution to it is impliedly forbidden" (p. 440).

The U.S. Solicitor General agreed that "all necessary agencies for legitimate purposes of state government" were "beyond the taxing power of Congress" (p. 443). However, he continued, the state business of dispensing liquor throughout its boundaries fell outside of that rule. "If a State embarks in the liquor business, it does so with the same consequences and subject to the same liabilities under the law as a private individual or an ordinary corporation" (p. 447).

Justice Brewer wrote the opinion for the majority. He noted that this was a conflict between two spheres of government, national and state, each with legitimate spheres of influence.

There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this... (p. 448)

Justice Brewer then stated two undebatable propositions of constitutional jurisprudence:

One is that the National Government is one of enumerated powers, and the other that a power enumerated and delegated by the Constitution to

Congress is comprehensive and complete, without other limitations than those found in the Constitution itself. (p. 448)

He then discussed the interpretation of the Constitution. After observing that its meaning didn't alter, Justice Brewer stated:

Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. (pp. 448-449)

Justice Brewer also observed that constitutional interpretations also needed to take cognizance of the common law and quoted an observation by Justice Matthews in *Smith v. Alabama*, 124 U.S. at 478, "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history" (p. 450). Finally, the Court opinion noted that "that which is implied is as much a part of the Constitution as that which is expressed.

Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it. (pp. 451-452)

The Court ruled that the state's power to be involved in the liquor business was a legitimate exercise of its sovereignty with which the federal government could not interfere. However, "whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation" (p. 463). The Supreme Court thus affirmed the decision of the Court of Claims.

*Significance for the guarantee clause.*

The opinion in *South Carolina v. United States* quoted a previous Court ruling in *Texas v. White*, 7 Wall. at 725 which noted the federal government's responsibility under the Guarantee Clause without specifically mentioning the Clause:

Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. (p. 453)

Shortly thereafter, the Court directly addressed the importance of the Guarantee Clause.

Each State is subject only to the limitations prescribed by the Constitution and within its own territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that "the United States shall guarantee to every State in this Union a republican form of government." Art. IV, sec. 4. That expresses the full limit of National control over the internal affairs of a State. (p. 454)

This provided the basis for the Court's ruling that the right of South Carolina to control liquor sales within its borders was sustained.

***Elder v. Colorado ex rel. Badgley*, 204 U.S. 85 (1907).**

*Case summary.*

The dispute centered on a dispute created by two claimants to the office of county treasurer arising from Colorado changing county and city jurisdictions involving Denver "from the old county of Arapahoe and the old city of Denver" to the "city and county of Denver" (pp. 85-86). The problem was created by the charter of the new city and county of Denver which changed the dates of election and the terms of officers from that specified by Colorado's constitution. Charles Badgley, the relator, was elected to the office in the general elections of November 1904, which was held according to Colorado statutes. Charles Elder, the defendant, was elected to the office in May 1904, under authority of the new charter for the city and county



of Denver. The District Court ruled that defendant Elder was the legal office holder. The Colorado Supreme Court reversed the lower court's ruling, finding instead that the charter provisions under which Elder was elected were "repugnant to the constitution of Colorado," and found in favor of relator Badgley (p. 86). The U.S. Supreme Court issued a writ of error to review the state supreme court's ruling.

Citing *Taylor v. Beckham*, 178 U.S. 548, Justice White delivered the opinion of the Court dismissing the writ of error and upholding the Colorado Supreme Court's ruling because the federal court had no jurisdiction.

[I]t is foreclosed that a mere contest over a state office, dependent for its solution exclusively upon the application of the constitution of a State or upon a mere construction of a provision of a state law, involves no possible Federal question. (p. 89)

*Significance for the guarantee clause.*

The Colorado Supreme Court, in discussing the legal situation, considered the Guarantee Clause of the U.S. Constitution and its own previous rulings regarding the need for state governments to maintain a republican character as required by the Guarantee Clause. If the charter provisions changing constitutional requirements were allowed to stand, the state high court reasoned, such a decision would "cut loose the city and county of Denver from any and all constitutional limitations and restrictions, and make the voice of the people, whether deliberately or hysterically expressed, the law in that locality" (86 Pac.Rep. at 236). The Colorado Supreme Court continued by quoting from a previous ruling of their Court: "Even by constitutional amendment the people cannot set apart any portion of the state in such manner that that portion of the state shall be freed from the Constitution" (86 Pac.Rep. at 237). Such an event would create "an imperium in imperio" (86 Pac.Rep. at 237). They found this situation analogous to a previous situation in which they had said:

[T]his could not be done, for the reason that such act would be subversive of a republican form of government, repugnant to the Constitution of the United States, and violative of the compact existing between the state and federal government. (86 Pac.Rep. at 237)

Because the charter conflicted with the Colorado Constitution, the provisions changing the terms of office and election dates were “invalid and inoperative” (86 Pac.Rep. at 239), and that officials elected under the charter’s provisions were “guilty of usurping, intruding into and unlawfully holding and exercising office” and were to be “ousted and excluded from ... office” (86 Pac.Rep. at 239)

The U.S. Supreme Court, taking note of the state high court’s consideration of the Guarantee Clause, stated:

Whilst, when a state court has considered a Federal question, that fact may serve to elucidate whether a Federal issue properly arises for consideration by this court, that doctrine has no application to a case where the controversy presented is inherently not Federal, and incapable of presenting a Federal question for decision. (p. 89)

***Coyle v. Smith, 221 U.S. 559 (1911).***

*Case summary.*

The dispute arose over an act of the Oklahoma legislature moving the state capital from Guthrie to Oklahoma City. Coyle, a resident of Guthrie, filed suit against Smith, the Secretary of State of Oklahoma, to prohibit the move. The Oklahoma Supreme Court ruled against the plaintiff who was then granted a writ of error by the U.S. Supreme Court. The U.S. Supreme Court upheld the ruling of the Oklahoma Supreme Court, observing that the validity of the Oklahoma statute relocating its state capital was a matter “of state law, not subject to the reviewing power of this court under a writ of error to a state court” (p. 563).

*Significance for the guarantee clause.*

To reach its final position, the Court had to confront a somewhat unusual claim by the plaintiffs, namely that the Guarantee Clause gave Congress the power to “impose terms and conditions upon the admission of” proposed new states which would “operate to deprive the State of powers which it would otherwise possess” (p. 566). Plaintiffs further asserted that congressional actions under the Guarantee Clause, being political, were “uncontrollable by the courts” (p. 566). Plaintiffs contended that the Oklahoma act removing the capital from Guthrie to Oklahoma City conflicted with the congressional Enabling Act by which Oklahoma was admitted as a state.

Justice Lurton, writing for the Court, opined:

The argument that Congress derives from the duty of “guaranteeing to each State in this Union a republican form of government,” power to impose restrictions upon a new State which deprives it of equality with other members of the Union, has no merit. (p. 567)

He further observed that the United States “was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself” (p. 567). The Guarantee Clause “obviously does not confer power to admit a new State which shall be any less a State than those which compose the Union” (p. 568). Furthermore, the Court, in reviewing its previous opinions, could find nothing that sanctioned “the claim that Congress may by the imposition of conditions in an enabling act deprive a new State of any of those attributes essential to its equality in dignity and power with other states” (p. 568). “The Constitution not only looks to an indestructible union of indestructible States, *Texas v. White*, 7 Wall. 700,725, but to a union of equal States as well” (p. 559, 579). According to the Court, “The power to locate its own seat of government, to change the same, and to appropriate its public money therefore, are essentially state powers beyond the control of Congress” (p. 559).

**The guarantee clause requires that legislation be overturned because of its unrepresentative nature.**

*Rice v. Foster, 4 Del. (4 Harr.) 479 (1847).*

*Facts & procedural history.*

This case contains aspects that are unique in several respects. First, it is a case where the principles of republican government secured by the Guarantee Clause constituted the sole constitutional issue. Second, arguments used to challenge the constitutionality of a Delaware statute prefigured later arguments used to challenge the constitutionality of state laws creating the initiative, the referendum, and conservation districts. These arguments focused upon what were perceived to be unconstitutional delegations of legislative power in violation of the principles of republican government which the Framers embedded in the Constitution. Finally, it represents one of the few cases whereby legislation was declared unconstitutional on the basis of a violation of the principles of republican government required of every state by the Constitution. While the discussion centered on the U.S. Constitution, the actual decision referenced the Delaware constitution.

In February 1847, the Delaware legislature approved a measure entitled “An act authorizing the people to decide by ballot, whether the license to retail intoxicating liquors shall be permitted among them” (p. 479). The measure allowed each county to determine the question by majority vote whether or not taverns and other stores selling alcoholic beverages would be allowed to operate within the county’s boundaries. Rice leased a “tavern house in Wilmington” to Foster that was located in the county of New Castle. A majority of voters in New Castle voted against permitting the liquor licenses in their county. Foster paid the rent on his lease to Rice up to the date the county vote went into effect “and refused to pay any more” (p. 481). Rice then brought suit to recover the funds not paid him by Foster. The action began in the Superior Court

for New Castle County who ordered that the questions be reserved “for hearing before ... the Court of Appeals” (p. 480). The case was heard during the court’s June term of 1847 “and was argued mainly on the constitutional question, (though objection was also taken to the validity and sufficiency of the election returns,...” (p. 481). Chief Justice James Booth delivered the court’s opinion that was unanimous on the Constitutional question, but split on the issue of the vote return’s validity. The latter question, however, was rendered moot by the court’s decision.

*Legal question.*

Does the Delaware law, which establishes a series of county referenda regarding whether or not liquor licenses shall be granted in each county, transfer or delegate legislative power in violation of the constitutional requirement that state governments be republican?

*Legal reasoning of opposing parties.*

One would normally expect that the party adversely affected by the majority vote in New Castle County (Foster as the operator of a tavern) would be the one to challenge the constitutionality of the law establishing such a referendum that deprived him of his livelihood. Such, however, was not the case. Foster’s attorneys argued that the Delaware statute was constitutional while Rice, the leaseholder, challenged both the constitutionality of the law as well as the vote totals for New Castle County.

Attorneys for Rice, the plaintiff, argued that “the act of 1847 was unconstitutional, because it was contrary to the limitations of legislative power necessarily involved in a representative republican form of government” (p. 481). According to plaintiff’s legal counsel, “The act of 1847 delegates legislative power to a majority of the people of a county” (p. 481). They explained:

The people cannot make a law; neither the whole people nor a part of them.  
All laws must be made by their representatives in general assembly met for

deliberation, consultation and judgment; acting under oath, and under the restrictions of the constitution. (p. 481)

Plaintiff's attorneys continued their argument by discussing the responsibilities of representatives once they were chosen by the people to enact legislation.

The representatives of the people in the legislature, though, in general, bound to respect the will of their constituents, are also bound to exercise their own judgment, and to oppose that will, when it invades individual rights, or violates the principles of the social compact. This is a right of minorities, which it was the object of the constitution to secure. (p. 481)

They further noted: "The general assembly is the depository of legislative power; which is a trust to be executed with judgment and discretion, and cannot be delegated to any other body, or persons" (p. 481). Concluding their arguments, counsel for Rice summarized: "Original and ultimate sovereignty is in the people; yet it is never exercised by them collectively, but only through agents of their selection. The purpose of elections is to choose such agents" (p. 482).

Foster's defense attorneys contended that the "act of 1847 was constitutional" because it did "not delegate legislative power" (p. 482). The Delaware legislature passed a law, expressed its opinion that the act was beneficial, and "declared the legislative will that such a law should exist, *if* a certain number, to wit, a majority of the people of either county, should vote in a certain way" (p. 482). The legislature has "the right to pass conditional laws, which are to commence their operation or to be void upon the happening of some future event, or some contingency..." (p. 493). Defense counsel pointed to the fact that state constitutions had been submitted to "a vote of the people" as a "strong argument in favor of the law" (p. 482).

Plaintiff's attorneys responded to the last argument by noting "that the framing of constitutions ... where no constitution existed before, was a different thing from passing laws under constitutions which vest legislative power in a particular branch" (p. 483).

Defense attorneys concluded by noting current laws that were “all on the same principle” as the act under attack: an “act for the establishment of free schools,” a “supplement to the Wilmington city charter,” and “the act authorizing school district No. 18, Kent county, to lay taxes by vote” (p. 483).

*Holding & disposition.*

The Delaware Act of February 1847 was nullified because it violated the Guarantee Clause. The court unanimously rendered judgment “for the plaintiff,” (p. 499).

*Court’s rationale.*

The opinion in *Rice v. Foster* stands among the more unique of the decisions read that have the Guarantee Clause as their subject matter. Serving as a possible primer on the purpose of government, the opinion by the Delaware Chief Justice distinguished between direct and representative democracy, discussed the constitutional Framers’ views on the same subject, provided historical examples illustrating the differences between the two types of democracy, and elaborated on the need for a constitution to protect rights and to restrain public passions.

Chief Justice James Booth confronted defense counsels’ argument that the Delaware Act was comparable to the legislation “establishing and supporting free schools” because such law delegated the power “to raise taxes for the support of their schools” (p. 495). The Chief Justice disagreed, noting that the school law constituted each school district in the state as “a corporation with limited powers” (p. 495). He continued by observing, “No power is granted to them, or to any other persons, to repeal or change any part of the law; nor does its existence or operation depend on the ... will or acts of the corporators” (p. 495). Booth concluded:

No ingenuity can discover the shadow of similitude between the act of the 19th of February, 1847, and any part of the school law. To say that the authority given to the school voters – to members of a corporation – to determine whether a tax shall be laid or not, is a grant of legislative power;

is an abuse of language. Legislative power is the power of making laws. (p. 495)

Addressing the “important question” regarding the constitutionality of the “act of the nineteenth of February,” the Chief Justice stated, “The proposition that an act of the legislature is not unconstitutional, unless it contravenes some express provision of the constitution is, in the opinion of this court, untenable” (p. 485). Noting the various purposes for which government was established, Booth continued:

The nature and spirit of our republican form of government ... have established limits to the exercise of legislative power, beyond which it cannot constitutionally pass. An act of the legislature directly repugnant to the nature and spirit of our form of government, or destructive of any of the great ends of the constitution, is contrary to its true intent and meaning... It is irrational to maintain, that such an act is a law, when it defeats the very object and intention of granting legislative power. (p. 485)

The Chief Justice next brought “the lessons of history” to bear on the question.

The framers of the Constitution ... were men of wisdom, experience, disinterested patriotism, and versed in the science of government. They had been taught by the lessons of history, that equal and indeed greater dangers resulted from a pure democracy, than from an absolute monarchy. Each leads to despotism. (p. 485)

Booth continued by noting the dangers of direct democracy and the need for representative democracy.

Whenever the power of making laws, which is the supreme power in a State, has been exercised directly by the people under any system of polity, and not by representation, civil liberty has been overthrown. Popular rights and universal suffrage, the favorite them of every demagogue, afford, without constitutional control or a restraining power, no security to the rights of individuals, or to the permanent peace and safety of society. (pp. 485-486)

Without the restraints of a constitution, when a government is founded completely on “popular will,” the people become subject to “impulse and passion” and are “betrayed into acts of folly, rashness and enormity” whereby “the great aim and objects of civil government are prostrated



amidst tumult, violence and anarchy” (p. 486). The Chief Justice pointed out that in the Constitutional Convention of 1787, “The members most tenacious of republicanism, were as loud as any in declaiming against the vices of democracy” (p. 486). After quoting several of the Framers, Booth discussed the final reasons why representative government was preferred over that of a direct democracy.

To guard against these dangers and the evil tendencies of a democracy, our republican government was instituted by the consent of the people. The characteristic which distinguishes it from the miscalled republics of ancient and modern times, is, that none of the powers of sovereignty are exercised by the people; but all of them by separate, co-ordinate branches of government in whom those powers are vested by the constitution. These co-ordinate branches are intended to operate as balances, checks and restraints, not only upon each other, but open the people themselves; to guard them against their own rashness, precipitancy, and misguided zeal; and to protect the minority against the injustice of the majority. (p. 487)

Observing that “[t]he making of laws is the highest act of sovereignty that can be performed in a free nation,” Booth reached this point of law:

The sovereign power therefore, of this State, resides with the legislative, executive, and judicial departments. Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it. To do so, would be an infraction of the constitution, and a dissolution of the government. (pp. 489, 488)

The court then turned to an examination of what transpired at the hands of the Delaware legislature.

Our legislature ... declined the responsibility which it was their duty to assume; and thus devolved the performance of their trust on the people of each county; in order that a majority ... might decide a question, which none had the authority to decide, but the legislature. (pp. 490-491)

Although laws licensing or forbidding the “sale of spirituous and vinous liquors are valid laws,” according to the Court, “No such law has been, or was intended to be passed by the legislature. They purposely avoided it” (p. 491). Accordingly, the Court declared, “The design and true

character of the act of the 19th of February last are, to confer the functions of the legislature of the State upon the people of a county” (p. 491).

Announcing the opinion of the Court, the Chief Justice declared:

The only check which the constitution interposes to an act of the legislature tending to such consequences, is an independent and upright judiciary. As the act ... is repugnant to the principles, spirit, and true intent and meaning of the constitution of this State, and tends to subvert our representative republican form of government, it is the unanimous opinion of this Court, that the said act is null and void...” (p. 499)

*Concurring/dissenting opinions.*

Justice Harrington and Chancellor Johns offered separate concurring opinions. Although the court was split regarding the adequacy of the vote, no separate dissenting opinions on that question were offered, probably because the question was rendered moot by the court’s unanimity regarding the Constitutional issue.

***Mississippi v. Johnson, 71 U.S. 475 (1866).***

*Case summary.*

Legal action in this case began directly with the Supreme Court by the State of Mississippi and involved a novel approach without legal precedent. Mississippi sought an injunction against President Johnson to prevent him from executing the provisions of the Reconstruction Acts passed by Congress in March 1867. The petition for injunction alleged that the Reconstruction Acts were unconstitutional, but didn’t seek a ruling directly on their constitutionality. Instead, the State of Mississippi argued that if not enjoined from executing the congressional action, the President would be “in violation of the Constitution, and in violation of the sacred rights of the States” (p. 477). The Reconstruction Acts, according to Mississippi, “annihilate the State,” make “the civil power subordinate to the military power,” and establish a “military despotism” by which people could be deprived of “goods, lands, liberty, and life”

without “observance of any of those requirements and guarantees by which the Constitution and laws so plainly protect and guard the rights of the citizen” (pp. 476-477).

Attorney General Stanberry argued that there was no precedent for such an approach and that “there is no allegation that the President is about to do anything of his own motion, which, as President, he is not authorized to do” (p. 482). The Attorney General further argued that “the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President” (p. 484). He later continued, “As President, he is beyond the control of any other department, except through the impeaching power... Only in that other chamber can you arraign him for anything done or omitted to be done while he is President” (p. 491).

The Chief Justice spoke for the court majority and noted that the Court would limit its inquiry to consideration of a single point: “Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional” (p. 498)? The Court further noted that “the application now made to us is without a precedent; and this is of much weight against it” (p. 500). Regarding challenges to the constitutionality of an act, the Court observed that “no one seems to have thought of an application for an injunction against the execution of the act by the President” (p. 500). The Supreme Court, according to the Chief Justice, “has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us” (p. 501). Therefore, a request for “an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received...” (p. 501). The Court denied then denied Mississippi’s request for such an injunction.

*Significance for the guarantee clause.*

Without specifically mentioning the Guarantee Clause, the State of Mississippi in effect argued that the Reconstruction Acts destroyed republican government in their state. Unspoken in the Court records, however, was the counterargument that the Guarantee Clause formed the justification for congressional passage of the Reconstruction Acts. The congressional Committee on Reconstruction concluded “that Congress derived the power to reconstruct the southern states and assure equal rights for all Negroes” (Bonfield, 1962, January, p. 539). The “overwhelming majority” of Congress believed that the Reconstruction Acts “insured the restoration of republican constitutions in the southern states (Bonfield, 1962, p. 542). Charles Sumner expressed the feeling of the “bulk of Congress” who believed Congress was “acting pursuant to the clause’s mandate:”

... by the national Constitution, the nation is bound to assure a republican government to all the States, thus giving to Congress the plenary power to fix the definition of such a government; but by the Declaration of Independence, the fundamental elements of this very definition are supplied in terms from which there can be no appeal. By this Declaration it is solemnly announced, first, that all men are equal in rights; and, secondly, that just government stands only on the consent of the governed... Whenever Congress is called to maintain a republican government, it must be according to these universal, irreversible principles. (Cong. Globe, 41st Cong., 2d Sess. 1358 [1870] [Sumner]; see also Cong. Globe, 40th Cong., 1st Sess. 614 [1867] [Sumner]. Cited in Bonfield, 1962, January, p. 543).

To reiterate, while not mentioned directly in the arguments or ruling, the Guarantee Clause lay at the center of any discussion for or against the Reconstruction Acts.

In a separate, somewhat ironic note, President Johnson had vetoed the Civil Rights Bill of 1866 on the grounds that the bill was unconstitutional because Congress “had no power to prevent the states from discriminating against Negroes” (Bonfield, 1962, January, p. 539). His veto, however, was overridden, and the Civil Rights Bill of 1866 became law. In like fashion, President Johnson subsequently vetoed the separate congressional acts of March 1867 that

collectively were known as the Reconstruction Acts. Both acts were “passed over the President’s veto” (*Georgia v. Stanton*, 73 U.S. 50).

***Georgia v. Stanton, 73 U.S. 50 (1868).***

*Case summary.*

Similar to *Mississippi v. Johnson*, a southern state avoided a direct challenge to the constitutionality of the Reconstruction Acts through an indirect challenge. Instead of seeking injunctive relief against the actions of the President, however, this action by Georgia asked the Court to enjoin Secretary of War Stanton, General Ulysses Grant, and Major-General Pope (military commander of the Third Military District comprised of Georgia, Florida, and Alabama) from “carrying into execution the several provisions of ... the ‘Reconstruction Acts’” (p. 50). Georgia’s petition argued that “the intent and design of the acts of Congress .. was to overthrow and to annul this existing State government, and to erect another and different government in its place, unauthorized by the Constitution and in defiance of its guarantees...” (p. 52). The heart of its objection was stated:

The change proposed by the two acts of Congress in question is fundamental and vital. The acts seize upon a large portion – whites – of the constituent body and exclude them from acting as members of the State. It violently thrusts into the constituent body, as members thereof, a multitude of individuals – negroes – not entitled by the fundamental law of Georgia to exercise political powers. The State is to be Africanized. This will work a virtual extinction of the body politic, to take its place and enjoy its rights and property. Such new State would be formed, not by the free will or consent of Georgia or her people..., but by external force. (p. 66)

Attorneys for Georgia concluded their argument by declaring, “Instead of keeping the guaranty against a forcible overthrow of its government by foreign invaders or domestic insurgents, this is destroying that very government by force” (p. 66).

Attorney General Stanberry presented a motion to dismiss the request for injunction because of a “want of jurisdiction” because it was a political question, not a judicial one (p. 53). The Court agreed and dismissed the case “for want of jurisdiction” (p. 78).

*Significance for the guarantee clause.*

The ruling upheld the previous decision of *Luther v. Borden*, but in doing so discussed the distinction between political and judicial matters as resulting from the Constitution’s incorporation of the doctrine of the separation of powers.

This distinction results from the organization of the government into the three great departments, executive, legislative, and judicial, and from the assignment and limitation of the powers of each by the Constitution.

The judicial power is vested in one supreme court, and in such inferior courts as Congress may ordain and establish: the political power of the government in the other two departments.

The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction. (p. 71)

***Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 18 (1912).***

*Facts & procedural history.*

In 1902 Oregon amended its constitution to include the initiative and the referendum. The initiative provided for a specified number of voters to be able to put desired legislation directly before the people for a popular vote that, if approved, would become state law. The referendum provided that voters could, either by petition of a specified number of voters or by legislative action, approve or disapprove laws passed by the state legislature.

In 1906 the initiative was used to pass a law taxing telephone and telegraph companies at a rate of 2% of a company’s gross revenue from business conducted within Oregon. One Oregon corporation, Pacific States Telephone and Telegraph Company (hereafter referred to as Pacific

States), refused to pay the tax whereupon the state filed suit in lower state court “to enforce payment of [the] assessment and the statutory penalties for delinquency” (p. 136).

Pacific States launched a three-pronged defense. First, they alleged defects in the tax’s nature and operation. Second, they challenged the constitutionality of the tax under the Oregon Constitution. Third, Pacific States challenged the constitutionality of the initiative and referendum as violating the Guarantee Clause of the U.S. Constitution. Oregon’s response was a demurrer. The lower court sustained the demurrer. As Pacific States offered no further pleading, the lower court ruled against the defendant. On appeal the Supreme Court of Oregon affirmed the lower court’s judgment. The U.S. Supreme Court issued a writ of error to hear the case. Thus the original plaintiff, Oregon, became the defendant and appellee before the Supreme Court while the original defendant, Pacific States, became the plaintiff and appellant in the final legal hearing of this case before the nation’s high court.

*Legal questions.*

Whose duty is it to determine if a State’s government has stopped being republican? Whose duty is it to enforce the Guarantee Clause of the Constitution? Did the adoption of the initiative and referendum provisions destroy republican government within the State of Oregon?

*Legal reasoning of opposing parties.*

Pacific States argued that the initiative tax measure violated the Equal Protection Clause of the Fourteenth Amendment because all other persons and entities in the state are subject only to “tax laws passed by the Legislative Assembly” whereas Pacific States is subject to legislatively enacted taxes as well as the initiative tax measure passed by the state’s citizens (p. 119). Pacific States next argued that the initiative tax measure violated “the right to a republican form of government which is guaranteed by § 4 of Art. IV of the Federal Constitution” (pp. 120-

121) because: first, the taxation power “belongs exclusively to the legislative branch” (p. 119); second, “representation and taxation must go together” (p. 120); and third, under our constitutional form of government, “[t]here can be but one source of legislation, but one law-making power in a State; that power must be a legislature...” (p. 120).

Building on these arguments in a fashion similar to the statements expressed by the Chief Justice of the Delaware Supreme Court in *Rice v. Foster*, Pacific States also differentiated between direct democracy and representative government, the former being “hateful to the founders of our government” and “subversive of the structure which they erected” (p. 123). According to Pacific States’ argument, “The framers of the Constitution recognized the distinction between the republican and democratic form of government, and carefully avoided the latter” (p. 124). They further argued that the “vital element in a republican form of government ... is representation. Legislation by the people directly is the very opposite, the negative of this principle” (p. 125). Pacific States also observed:

The direct exercise of the powers of government by the people at large would remove from a republic the feature which distinguishes it from a democracy. That government cannot be said to be representative in which the people at large are the legislators. (p. 124)

Therefore, they concluded, “Initiative legislation is invalid because government by the people directly is inconsistent with our form of government” (pp. 124-125).

The State of Oregon responded to the appellant’s claim that the initiative violated the Guarantee Clause of the Constitution with a two-pronged argument that dealt with the two avenues open to the Court, the first possibility being one in which the Court might determine that the major question was political in nature, the second possibility being one whereby the Court would determine the question was judicial. First, Oregon noted that according to previous Court rulings (*Luther v. Borden*, *Texas v. White*, *Taylor v. Beckham*, and *In re Duncan*), the issue has



been treated as a “political question” (p. 129). “The power to determine whether a State has a republican form of government is vested in Congress. Hence it is a political rather than a judicial question” (p. 129).

Regarding the possibility that the Court would view the issue as a judicial one, appellee, citing *Luther v. Borden*, noted that “[i]f the question is a judicial one, courts of the United States will follow the decision of the state courts, where the state court has passed upon the question” (p. 129). Next, should the Court decide to retain jurisdiction and not defer to the state court, Oregon argued:

A state constitution should not be held to contravene the Federal Constitution unless the general scope and plan of government provided in the former is opposed to the general scope and plan of government required by the latter, to be maintained by the State. The initiative and referendum amendment is essentially republican in form as guaranteed in the Federal Constitution... (p. 130)

According to Oregon, “The members of the Federal convention considered a ‘republican form of government’ to be a government which derived all its powers from the great body of the people” (p. 131). The appellee, the State of Oregon, continued, “Both the Federal and state courts have uniformly held that the initiative method of enacting laws was not repugnant to the provisions of § 4, Art. IV, of the Federal Constitution, either directly or by necessary inference” (p. 131).

Furthermore, Oregon noted, the federal executive and legislative branches have in effect determined that reserving the initiative and referendum powers to the people does not violate either the Constitution or the Guarantee Clause because Congress passed legislation that was signed by the President admitting Oklahoma and Arizona to the Union, both states having “the initiative and referendum principles reserved to the people” in their state constitutions (p. 130). Oregon further noted that the following states had amended their state constitutions to include

the initiative and referendum without federal objection: “South Dakota, Utah, Colorado, Arkansas, Maine...” (p. 132).

Pertaining to the Fourteenth Amendment claim made by Pacific States, the State of Oregon responded:

The act does not violate any of the provision of § 1 of the Fourteenth Amendment. Assuming that the act under consideration was lawfully enacted the taxes levied thereby must be considered a valid exercise of the taxing power of the State... (p. 132)

*Holding & disposition.*

The legal questions are political in nature and thus lie outside the Court’s jurisdiction. The enforcement of the Guarantee Clause belongs to the political department. The issue of whether the initiative and referendum makes a state adopting those provisions no longer republican as required by the Guarantee Clause “is a purely political question over which this court has no jurisdiction” (p. 119). The Court dismissed the writ of error.

*Court’s rationale.*

The Court relied heavily upon *Luther v. Borden* which it extensively reviewed for six pages (about 1/3 of the total pages devoted to the opinion) and upon *Taylor v. Beckham* to a lesser extent which occupied approximately one page of the Court’s opinion. Chief Justice White delivered the opinion. He noted that Pacific Telephone had already withdrawn its arguments before the Court regarding the validity of the tax regarding its defective nature. The Chief Justice then dispensed with Pacific Telephone’s arguments concerning the state’s constitution by noting that “they are concluded by the judgment of the state court” (p. 136). Turning next to the Fourteenth Amendment claim, the Court stated that it was “merely superficial” because the reasons supporting the equal protection clause and violation of fundamental rights arguments were “solely based on § 4 of Art. IV” (p. 140). The real

arguments advanced by the appellant centered on the Guarantee Clause, according to the Court.

“In other words, the propositions each and all proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon” (p. 141).

The Court noted that if the Court were to find in favor of Pacific Telephone, the consequence would be to invalidate not only the tax initiative, but also “every statute passed in Oregon since the adoption of the initiative and referendum” (p. 141). The Court next moved to consideration of the implications to the nation at large that would occur should the Court sanction a doctrine providing for “the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political” (p. 141). Following such consideration, Chief Justice White asked:

Do the provisions of § 4, Art. IV, bring about these strange, far-reaching and injurious results? That is to say, do the provisions of that Article obliterate the division between judicial authority and legislative power upon which the Constitution rests? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it and thus overthrow the Constitution upon the ground that thereby the guarantee to the States of a government republican in form may be secured, a conception which after all rests upon the assumption that the States are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the Nation. (p. 142)

The Court declared that such contentions were repugnant “to the letter and spirit” of the Constitution (p. 142-143). Characterizing the appellant as having misconceptions on the one hand and the appellee as having misapprehensions on the other hand, the Court declared that a “mere citation of the cases” would be insufficient, that what was needed was for the Court to “state more at length than we otherwise would the issues and the doctrine expounded in the leading and absolutely controlling case – *Luther v. Borden*” (p. 143). Numerous quotations were provided from *Luther v. Borden* as well as citations from *Taylor v. Beckham* which quoted

*Luther v. Borden*. Believing that the issue had been well settled, the Court noted that it was inappropriate “to suggest that the settled distinction ... between judicial authority over justiciable controversies and legislative power as to purely political questions tends to destroy the duty of the judiciary in proper cases to enforce the Constitution” (pp. 149-150). Besides being inappropriate, such a suggestion arises

from failing to distinguish between things which are widely different, that is the legislative duty to determine the political questions ... and the judicial power .. to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power. (p. 150)

Reaching what was determined to be a foregone and inescapable conclusion, the Chief Justice delivered the ruling whereby the issues, being “political and governmental,” were “not therefore within the reach of judicial power” (p. 151). Since the case was not within the Court’s jurisdiction, “the writ of error must therefore be, and it is, dismissed for want of jurisdiction” (p. 151).

*Concurring/dissenting opinions.*

There were no separate opinions offered as the ruling was a unanimous 9-0 decision.

***Kiernan v. Portland, 223 U.S. 151 (1912).***

*Case summary.*

Both the preceding case and this one were decided the same day by the Court. Although the facts differed somewhat, both cases challenged the constitutionality of the initiative and referendum in Oregon. Similar arguments were used. Since the decision in this case followed *Pacific States v. Oregon*, the Court referred to the *Pacific States* decision as part of the rationale for dismissing the writ of error. The other reason for dismissing the case for want of jurisdiction centered on the fact that the Supreme Court of Oregon had already ruled on the constitutionality

of the initiative and referendum from the state constitutional viewpoint; therefore, their decision was regarded as controlling.

The facts differed regarding the application of the initiative and referendum to municipalities in Oregon. After the state constitution had been amended to include the initiative and referendum, “two other amendments to the constitution were adopted by that method” (p. 159). The first amendment applied the initiative and referendum to municipal legislation while the second amendment provided opportunities to municipal voters to “enact and amend their municipal charter, subject to the constitution and criminal laws of the State of Oregon” (p. 160, note). Voters in the City of Portland approved amending their municipal charter to provide for the construction of a bridge across the Willamette River in Portland and to issue bonds to pay for the project. Kiernan filed for an injunction to stop the sale of bonds and thus prevent the city from “carrying out ... the amendment of the city charter which had been adopted...” (p. 162).

According to the Court’s synopsis of events, “The case was submitted to the trial court on bill and answer, and resulted in the dismissal of the bill. The case was taken to the Supreme Court of the State, where that judgment was affirmed” (p. 162). The Court noted that the Oregon Supreme Court’s opinion ruled that the application of the initiative and referendum to municipalities did not violate the state’s constitution. The Court also pointed out that the Oregon Supreme Court had discussed the “various contentions concerning these subjects, based upon the Constitution of the United States” and that the state high court had disposed of them also “in the course of the opinion” (p. 162).

*Significance for the guarantee clause.*

Both decisions, *Kiernan* and *Pacific States*, reaffirmed the precedent established in *Luther v. Borden* as most immediately reaffirmed by *Taylor v. Beckham*. This precedent was that

the determination of whether the government of a State is republican in form within the meaning of § 4 of Art. IV of the Constitution is a political question within the jurisdiction of Congress and over which the courts have no jurisdiction. (p. 151)

***Denver v. New York Trust Company, 229 U.S. 123 (1913).***

*Case summary.*

This case also challenged the constitutionality of the initiative and referendum via the Guarantee Clause and the Fourteenth Amendment, but it was more complicated than *Pacific States* and *Kiernan*. Complicating factors arose from the intertwining of contract law in the dispute as well as the involvement of three separate parties in the legal proceedings – the City and County of Denver, the Denver Union Water Company, and the water company’s mortgage holder, the New York Trust Company. A final complicating factor emerged from the amended state constitution of 1902 which granted home rule to municipalities under whose authority Denver voters framed and adopted their own charter providing for the initiative and referendum in 1904.

Denver’s original contract with the water company began in 1870 for a twenty-year period. That was modified in 1874 to run for a seventeen-year period. In 1890, a year before the contract with the water company expired, Denver passed an ordinance extending the contract until April 10, 1910, and further provided options for renewal or non-renewal of the contract as well as purchase by the city or not of the water company with a mechanism established for appraising the property. In 1904 Denver voters amended their charter as authorized by the amended Constitution of Colorado. Subsequently Denver re-affirmed the terms of the 1890

agreement with the notation that the options specified would now be subject to “an approving vote of the taxpaying electors” (p. 129). In 1907, some two and one-half years before the expiration in 1910 of the contract between the water company and the city, the city passed an ordinance that was accepted by the water company to conduct an appraisal of the water company’s value as well as to submit the questions of which options to pursue to the voters. The appraisal was \$14 million, which the city thought too high. The agreement of 1890 expired on April 10, 1910. On May 17, 1910 the Denver voters amended their charter by which they created a public utilities commission “with large powers in respect of the construction, acquisition, maintenance and operation of a water plant” (p. 130). The amended charter required that questions regarding purchase of water plants or granting/renewal of contracts for water distribution be subjected to municipal voters for their approval. The amendment also authorized bonds of \$7 million for the purchase of the existing water plant, subject to voters approving the purchase.

The water company refused the \$7 million offer, arguing that the city was obligated to either renew the contract or to purchase the plant at its appraised value. The city argued that the options “were not alternative in the sense that one or the other must be exercised, but were independent in the sense that there was no obligation to exercise either” (p. 131). They also noted that the contract resulting from the 1890 ordinance was limited to 20 years and had expired. The trust company, operating in its capacity as the trustee of a mortgage with the water company that was given in 1894, filed suit against the city. The trust company sought a court order that would “declare that the city had elected and become obligated to purchase the property, to direct a specific performance of that obligation” at the “purchase price to the trust company under the mortgage, and restrain and enjoin the city” from building a new water plant

(p. 132). The water company then filed a cross-bill against the city and the trust company asking the court to establish the company's "right to a renewed contract ... for another term of 20 years" (p. 132).

The Circuit Court issued "interlocutory orders" (an action not final or definitive, but made during the progress of an action [Gove, p. 179]) on both legal actions, one "temporarily enjoining the city" from proceeding to construct a water plant and from issuing bonds for such construction, and the other preventing any interference with the water company's continuing to enjoy its rights under the contract of 1890 (pp. 132-133). Upon appeal the Circuit Court of Appeals for the Eighth Circuit affirmed the interlocutory orders. The U.S. Supreme Court granted certiorari to review the decisions.

Without examining the arguments and reasoning regarding the contract law aspects of the case, I will simply report that the Court ruled for the City and County of Denver. Justice Van Devanter, speaking for the Court, after extensively reviewing the conflicting contractual arguments, declared, "In so far, then, as the bill and cross-bill are founded upon the contractual relations..., they must fail" (p. 140). The Court then dismissed the allegation that rights guaranteed by the Due Process Clause of the Fourteenth Amendment were infringed by noting that with the expiration of the contract, neither the water company nor its trustee had valid property rights. Justice Van Devanter next addressed the claim that rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment were violated by Denver because only the water supply was regulated by the charter amendment which left all other public utilities "under general charter provisions" (p. 142). The Court observed, "There is no merit to this objection. The equal protection clause is directed only against arbitrary discrimination, that is, such as is without any reasonable basis" (p. 143). According to the Court, the Equal Protection



Clause “does not prevent a city from applying the scheme of municipal ownership and maintenance to one public utility without applying it to all” (p. 143). The Court concluded, “There is nothing unequal in this in the sense of that clause” (p. 143).

The Court noted the objection named in the cross-bill, namely that the state constitution upon which the charter amendment was based was

repugnant to Article IV, § 4 of the Constitution of the United States guaranteeing to the State a republican form of government, in that it takes from the state legislature and vests directly in the people of the city legislative power over all subjects of purely municipal concern... (p. 141)

Justice Van Devanter observed that such a claim had recently “disposed of ... by our recent decision in *Pacific States Telephone & Telegraph Co. v. Oregon*” (p. 141). He also noted that since the Supreme Court of Colorado had also ruled on the constitutionality of the amended constitution previously, that claim was “foreclosed” (p. 141).

The Court reversed the interlocutory decrees and remanded the case “with direction to dismiss both bills on the merits” (p. 145).

*Significance for the guarantee clause.*

This is the second case, which dismissed claims arising under the Guarantee Clause by referencing the *Pacific States* decision that was, in turn, based upon both the *Luther v. Borden* and the *Taylor v. Beckham* rulings.

***Marshall v. Dye, 231 U.S. 250 (1913).***

*Case summary.*

This case originated in an attempt by the legislature and governor of Indiana to submit an entirely new state constitution to voters for approval. Suit was brought in the Circuit Court of Marion County, Indiana, by Dye who sought to enjoin Governor Marshall and other state officials from taking the necessary steps to submit the new constitution to voters. Dye argued

that the legislative act of 1911 proposing to submit a new constitution to Indiana voters was unconstitutional under Indiana's constitution because of a "want of authority in the legislature to submit an entire constitution to the electors of the State for adoption or rejection" (p. 256). In the unlikely event that the new constitution was to be construed as "a series of amendments," such action was still unconstitutional because the state's constitutional requirement that such amendments "receive the approval of two general assemblies" had not been met (p. 256).

The Indiana Attorney General argued that Indiana courts "have no power or jurisdiction over the Governor of the State to enjoin official action in any case" and that the "court had no power to interfere with the exercise of legislative discretion" (pp. 251-252). Court interference with the executive and legislative branches of the state government would deny "Federal rights" secured by "Article IV, § 4, of the Constitution of the United States, which provides that the United States shall guarantee to every State in the Union a republican form of government" (p. 256).

The Circuit Court granted an injunction, ruling that the legislative action violated the state's constitution. On appeal the Supreme Court of Indiana affirmed the Circuit Court's ruling. The U.S. Supreme Court issued a writ of error to review the case. Before the case could be heard, Dye died and his executor was approved by the Court to continue the case on Dye's behalf.

Justice Day delivered the Court's decision upholding the Indiana Supreme Court's ruling and dismissing the writ of error. Regarding Indiana's Guarantee Clause claim, the Court cited its ruling in *Pacific States* and observed that the

full treatment of the subject in that case renders further consideration of that question unnecessary, and the contention in this behalf presents no justiciable controversy concerning which the decision is reviewable in this court upon writ of error to the state court. (pp. 256-257)

The Court observed that the appeal was brought by state officials and further noted that they were prohibited from reviewing “the judgment of the highest court of a State” because of the requirement that parties seeking review must “have a personal as distinguished from an official interest in the relief sought” (p. 257). According to the Court, the appellants would be affected by the outcome “in their official capacity only” (p. 259). Therefore, “the judgment of the state Supreme Court is not reviewable here, as it is not alleged to violate rights of a personal nature, secured by the Federal Constitution or laws” (p. 259).

*Significance for the guarantee clause.*

*Marshall v. Dye* is the third case in a two-year period to cite the ruling in *Pacific States* as a controlling factor in the Court’s deliberation. As such it continues the precedent first articulated in the dicta of *Luther v. Borden* that the “enforcement of the provision in Article IV, § 4 of the Constitution ... depends upon political and governmental action through the powers conferred on the Congress and not those conferred on the courts” (p. 250). *Marshall v. Dye* also offers a corollary to the effect that claims alleging the denial of republican government by state court rulings on state constitutional issues because of “the interference of the judicial department with the legislative and executive departments” do not “present a justiciable controversy” that can be reviewed by the U.S. Supreme Court (p. 250).

***O’Neill v. Leamer, 239 U.S. 244 (1915).***

*Case summary.*

The Nebraska legislature delegated authority to state district courts to organize drainage districts throughout the state as public utilities for the welfare of the public. O’Neill filed suit to enjoin a water district thus formed from condemning his land for a right of way to construct a ditch that would drain, reclaim, and protect the “lands in the district from overflow” (p. 247).

Leamer was one of the supervisors chosen to oversee the drainage district created by the state district court.

O'Neill alleged that the delegation of authority by the legislature to the courts violated the Guarantee Clause as it made a government that was not republican. He also claimed that the purpose of the ditch was "essentially for a private purpose and hence contrary to the Fourteenth Amendment as amounting to a deprivation of property without due process of law" (p. 249). The plaintiff also argued that the taking of private land for the ditch through condemnation proceedings and appointed appraisers denied him "the equal protection of the laws in violation of the Fourteenth Amendment" (p. 246).

The trial court made findings establishing that all aspects of state law had been followed by the District Court in creating the water district as a public corporation and by the supervisors in administering the required steps to plan for and construct a drainage ditch for the public welfare. Based upon its findings, the trial court issued a temporary injunction until the lands had been paid for, at which time the injunction "should be dissolved and the action dismissed" (p. 247). Upon appeal, the Nebraska Supreme Court affirmed the judgment of the trial court. The U.S. Supreme Court issued a writ of error to review the actions taken by the Nebraska courts.

Justice Hughes, speaking for the Court, declared,

The propriety of the delegation of authority to the District Court in the matter of the formation of the drainage district is a state question. The attempt to invoke § 4 of Article IV of the Federal Constitution is obviously futile (*Pacific Telephone Co. v. Oregon*, 223 U.S. 118)... (pp. 247-248)

Turning next to the arguments put forth by the plaintiff, who was also the appellant before the Supreme Court, Justice Hughes observed:

We find no ground for a contrary view as to the nature of the authorized enterprise. We have repeatedly said that the provisions of the Fourteenth Amendment, embodying fundamental conceptions of justice, cannot be

deemed to prevent a State from adopting a public policy for the irrigation of arid lands or for the reclamation of wet or over-flowed lands. ...there is nothing in the Federal Constitution which denies to them the right to formulate this policy or to exercise the power of eminent domain in carrying it into effect. (p. 253).

Finding that the ruling of the Nebraska courts had “abundant support in the decisions of this court,” the Supreme Court affirmed the judgment of the Nebraska Supreme Court (p. 254).

*Significance for the guarantee clause.*

With differing subject matter, *O’Neill v. Leamer* marks the fourth decision in four years whereby the Court cited *Pacific States* as prohibiting court involvement in questions based upon the Guarantee Clause.

***Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916).***

*Case summary.*

This case represented yet another challenge to the constitutionality of the referendum provision, this time in Ohio. In 1912 the constitution of Ohio was amended to provide for the referendum. Pursuant to the apportionment act passed by Congress in 1911, the Ohio legislature in 1915 approved “an act redistricting the State for the purpose of congressional elections” that changed some of the existing districts (p. 566). The required number of eligible voters petitioned to have the measure submitted to a popular vote under the requirements of the referendum provision of the state constitution. The election was held, and the reapportionment law was defeated.

Suit was then filed with the Ohio Supreme Court seeking a mandamus that would direct state election officers “to disregard” the results of the referendum and “to proceed” under the assumption that the referendum was “void” and that the original bill passed by the Ohio legislature “was subsisting and valid” (pp. 566-567). The argument was that “the referendum

vote was not and could not be a part of the legislative authority of the State” because it conflicted with § 4, Art. I and § 4, Art. IV of the U.S. Constitution (p. 567). § 4, Art. I provided that “The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof” (p. 567). Furthermore,

to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government and causes a State where such condition exists to be not republican in form in violation of the guarantee of the Constitution. Const., § 4, Art. IV. (p. 569)

The eligible voters of the state by way of a referendum cannot constitutionally be a part of the “legislative power” of the state (p. 566).

The Supreme Court of Ohio ruled that the referendum vote was valid under the state constitution which, by way of the amendment of 1912, had declared that the legislative power of the State of Ohio was

vested not only in the Senate and House of Representatives of the State, constituting the General Assembly, but in the people in whom a right was reserved by way of referendum to approve and disapprove by popular vote any law enacted by the General Assembly. (p. 566)

Chief Justice White delivered the opinion of the Court whereby it declined to review the decision of the Ohio Supreme Court regarding the constitutionality of the referendum in terms of the state constitution. Regarding the federal constitutional arguments, the Court observed that the plaintiff’s arguments

disregard the settled rule that the question of whether that guarantee of the Constitution has been disregarded presents no justiciable controversy but involves the exercise by Congress of the authority vested in it by the Constitution. *Pacific Telephone Co. v. Oregon*, 223 U.S. 118. (p. 569)

Noting that it made no difference in terms of outcome whether the Court dismissed the case for “want of merit in the Federal questions relied upon” or whether the Court affirmed the lower court’s decision, the Court affirmed the Ohio Supreme Court’s verdict (p. 570).

*Significance for the guarantee clause.*

*Ohio ex rel. Davis v. Hildebrant* marks the fifth decision in five years in which the Court cited *Pacific States* as prohibiting court involvement in questions based upon the Guarantee Clause. This case also represents the fourth unsuccessful attempt to get the initiative and/or the referendum declared unconstitutional by way of the Guarantee Clause.

***Mountain Timber Company v. Washington, 243 U.S. 219 (1917).***

*Case summary.*

A lumber company challenged the constitutionality of the Washington Workmen’s Compensation Act passed in 1911. Under the act, employers made contributions to an industry-wide fund to be administered by the state in compensating workers or surviving family members for worker injury or death suffered on the job. The law mandated participation by both employers and employees. The quid pro quo for employer contributions used to fund worker compensation was “exemption from liability” for accidental injury (p. 234). The declaration of policy in the first section of the act noted that “the common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions” wherein injuries occurred with inadequate remedy for workers (p. 228). Citing the belief that the “welfare of the State depends upon its industries, and even more upon the welfare of its wage-workers,” the state declared it would exercise its “police and sovereign power” to withdraw “all phases” of the problem from “private controversy” (p. 228).

Washington initiated the action to recover premiums required by the act that were not paid by Mountain Timber Company as an employer in a hazardous industry. A lower state court ruled for the state. On appeal to the Supreme Court of Washington, the logging company “by demurrer raised objections to the act based upon the Constitution of the United States” (p. 227). The state high court overruled the demurrer and affirmed the lower court’s judgment in favor of the state. The U.S. Supreme Court issued a writ of error to review the decision.

Originally the defendant, the appeal process made Mountain Timber Company the appellant. Its defense combined tort and constitutional arguments of law. The reader wishing to understand more of the tort aspect of the case, from the point of view of both the attorneys’ arguments and the Court’s rationale, are urged to read the case for its warnings of the specters of socialism, communism, old-age pensions, and insurance for both sickness and unemployment, all of which were portended, according to the logging company’s attorneys, by the Washington law through “philanthropic interference with the liberty of a self-reliant race” (p. 223).

Constitutional arguments by Mountain Timber Company referenced the Seventh Amendment, the Fourteenth Amendment, and the Guarantee Clause. The Seventh Amendment regarding the right to a trial by jury was alleged to be violated because of the Washington law’s withdrawing the “right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury” (p. 235). However, the Court found that “nothing in the act excludes a trial by jury,” as willful injury or death by either employer or employee were excluded from the act’s prohibitions of legal action (p. 235).

The Fourteenth Amendment’s Due Process Clause was violated by the Act’s requirement of payment “to a fund for the benefit of employees, without regard to any wrongful act of the employer” (p. 235). Such action deprived the employer “of his property, and of his liberty to



acquire property, without compensation and without due process of law” (p. 235). The Equal Protection Clause of the same amendment was violated because certain industries were singled out as being hazardous and thus subject to the Act while others, notably agriculture, were not affected by the law.

In approaching the Fourteenth Amendment arguments, the Court rephrased the legal question.

[T]he crucial inquiry under the Fourteenth Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of its validity, and the burden of proof and argument is upon those who seek to overthrow it. (pp. 237-238)

The critical questions centered on whether the law’s purpose was the public interest or that of a private interest and whether or not the charges were “reasonable” or “oppressive” (p. 238).

Regarding the first question, the Court quoted from *Barbier v. Connolly*, 113 U.S. 27, 31:

Neither the [fourteenth] amendment – broad and comprehensive as it is – nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. (p. 238)

Regarding the second question, the Court quoted from the same decision:

Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote ... the general good. (p. 239)

The Court then determined that the Washington Workmen’s Compensation Act did not infringe the Fourteenth Amendment’s provisions.

Regarding the Guarantee Clause argument, Justice Pitney stated:

As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress and

not to the courts. *Luther v. Borden*, 7 How. 1, 39,42; *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118; *Kiernan v. Portland, Oregon*, 223 U.S. 151; *Marshall v. Dye*, 231 U.S. 250, 256; *Davis v. Ohio*, 241 U.S. 565. (pp. 234-235)

The Court, in a 5-4 decision, affirmed the judgment of the Supreme Court of Washington. No dissenting opinions were presented.

*Significance for the guarantee clause.*

*Mountain Timber Co. v. Washington* marks the sixth decision in as many years whereby the Court cited *Pacific States* as prohibiting court involvement in questions based upon the Guarantee Clause. For the legal scholar, this decision sandwiches *Pacific States* between *Luther v. Borden* and the cases subsequent to *Pacific States*.

***Massachusetts v. Mellon, 262 U.S. 447 (1923).***

*Case summary.*

This case and the *Stanton* decision are the only cases thus far which have intimated that the Court would not review congressional action pursuant to § 4, Art. IV, of the Constitution. Although the Commonwealth of Massachusetts relied primarily upon the Tenth Amendment and only secondarily upon the Guarantee Clause in its arguments, the Court's opinion addressed the justiciability of political arguments in terms previously used to address questions arising under the Guarantee Clause. For the aforementioned reasons, *Mellon* is located in this chapter.

The issue involved the congressional "Maternity Act" passed in 1921 for the purpose of "cooperating" with the states "to reduce maternal and infant mortality and to protect the health of mothers and infants" (p. 447). States were given the option of participating or not. Those who agreed to participate received funds upon approval of a state plan submitted to a federal bureau created by the act. Participating states then made reports regarding their "operations and

expenditures” to the federal bureau who could withhold funds from the state that the bureau deemed to have been improperly expended (p. 447).

The Commonwealth of Massachusetts elected not to participate in the program established by the Maternity Act and subsequently initiated a suit in the U.S. Supreme Court challenging the constitutionality of the law. The Massachusetts’ Attorney General countered the justification that the congressional program was authorized under Art. I, § 8 of the Constitution by citing opposing views of the Founding Fathers about the meaning of the “general welfare clause” (p. 463). Hamilton had held that funds could be raised and appropriated for “any public purpose connected with the general welfare of the United States” (p. 463). Madison and Jefferson, on the other hand, believed that the general welfare clause was “merely descriptive of and limited by the specific grants of power to Congress contained in § 8, and that the power to tax and appropriate [was] therefore confined to the enumerated powers” (p. 463). Congressional attempts to move beyond the enumerated powers violated the Tenth Amendment by which powers not delegated to the Union were reserved to the states.

Next, the Attorney General for Massachusetts argued that the act established a “system of government by cooperation between the United States and the States accepting the act” that excluded Massachusetts (p. 471). Citing *Texas v. White* and *South Carolina v. United States*, the Commonwealth’s Attorney General indirectly advanced the Guarantee Clause by asking that Massachusetts “be restored to its position as one of the States in a Federal Union” (p. 471). He further argued that the current case did not involve a “political question” nor did it ask the Court to

decide what is the established government in a State, and to enforce the constitutional guarantee of a republican form of government under Const., Art. IV, § 4. *Luther v. Borden*, 7 How. 1; *Taylor & Marshall v. Beckham*,

178 U.S. 548; *Pacific Tel. Co. v. Oregon*, 223 U.S. 118; *Davis v. Ohio*, 241 U.S. 565; *Mountain Timber Co. v. Washington*, 243 U.S. 219. (p. 472)

The Attorney General began his conclusion by noting “that so-called ‘Federal Aid’ legislation by Congress ... has been found to be an effective way to induce States to yield a portion of their sovereign rights” (p. 474). He concluded:

[U]nless checked by this Court on the ground of unconstitutionality, no limit can be foreseen to the amounts which may thus be expended for matters of local concern, resulting in the establishment of large federal bureaus with many officers for the performance of duties entirely outside the purview of the Constitution. (pp. 474-475)

Justice Sutherland delivered the Court’s decision “that the cases must be disposed of for want of jurisdiction without considering the merits of the constitutional questions” (p. 480). He stated that Massachusetts presented “no justiciable controversy” in that their powers were not invaded “since the statute imposes no obligation but simply extends an option which the State is free to accept or reject” (p. 480). As a prelude to a lengthy discussion of justiciability, the Court synthesized the state’s arguments.

In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power. (p. 483)

After discussing and quoting at length from previous decisions, Justice Sutherland articulated what he viewed as the demarcation line between justiciable and nonjusticiable issues.

It follows that in so far as the case depends upon the assertion of a right on the part of the State to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government. No rights of the State falling within the scope of the judicial power have been brought within the

actual or threatened operation of the statute and this Court is as much without authority to pass abstract opinions upon the constitutionality of acts of Congress as it was held to be, in *Cherokee Nation v. Georgia*, *supra*, of state statutes. (p. 485)

Expounding further upon the topic near the end of the opinion, the Court noted, “We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional” (p. 488). Continuing later, Justice Sutherland stated:

The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. (p. 488)

To declare the act of Congress unconstitutional, the Court concluded, “would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess” (p. 489). The Court then officially dismissed the case.

#### *Significance for the guarantee clause*

As noted previously, this is one of only two decisions thus far whereby the Court declined to question congressional action on the basis of the Guarantee Clause. *Mellon* also provides interest in its discussion of the dividing line between nonjusticiable and justiciable legal issues. Finally, *Mellon* is the first case thus far examined that centers on the issue of conditional federal aid’s impact upon federalism.

#### ***Ohio ex rel. Bryant v. Akron Metropolitan Park District et al*, 281 U.S. 74 (1930).**

##### *Case summary.*

While the issues are fairly straightforward, the litigation process for this case is more complex as new issues emerged from the activities of the courts involved. Yet in the end, the

issues were summarily dealt with in simple fashion by Chief Justice Hughes, primarily by relying upon precedent.

Ohio law empowered county probate judges to establish park districts if they find, through a process of petitions, notice, and hearing, that such “will be conducive to the general welfare” (p. 74). Upon a positive finding, the judge is then required to appoint a board of park commissioners who are empowered to “acquire lands within the district for the conservation of its natural resources,” to “lay assessments,” to “levy limited taxes upon all taxable property within the district,” and to “adopt regulations for the preservation of good order within and adjacent to such parks” (pp. 74-75).

Bryant, an Ohio taxpayer, filed suit in the Court of Common Pleas seeking an injunction to stop the proceedings of the Akron Metropolitan Park District on the basis of a challenge to the “validity of the Park District Act of the State” (p. 76). Bryant argued that the statute violated the Ohio constitution, both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, and the Guarantee Clause. The Fourteenth Amendment and the Guarantee Clause arguments were intertwined in that both were violated, according to the plaintiff, by the “unconstitutional delegation of legislative power to the probate court and to the nonelective park commissioners” by the Park District Act (p. 77). It was further argued that the lack of an appeal process for the probate judge’s decision to establish a park district violated the due process requirements of the Fourteenth Amendment.

The Court of Common Pleas sustained the validity of the Park District Act. Upon appeal, the Court of Appeals affirmed the judgment of the Court of Common Pleas. On a writ of error to the Supreme Court of Ohio, the state’s high court was divided. Two justices held the statute to be valid while five justices thought it not valid. However, the Ohio constitution provided that

“no law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges” (p. 77). In accordance with the state constitution, the Supreme Court of Ohio subsequently affirmed the lower courts’ judgments in favor of the defendant, the Akron Metropolitan Park District. Bryant’s attorneys then entered motions in the Ohio Supreme Court to have the judgments vacated and to have a judgment of reversal entered because the afore mentioned constitutional provision

was in conflict with the Fourteenth Amendment of the Federal Constitution in that it denied to citizens of Ohio due process of law and the equal protection of the laws, and also that the provision was repugnant to Section 4 of Article IV of the Federal Constitution assuring to every State a Republican form of government. (p. 77)

The state supreme court overruled the plaintiff’s motions. The case was then brought on appeal to the U.S. Supreme Court, but the appeal contained the additional argument challenging the validity of the Ohio constitutional provision by which judgment went against the plaintiff, Bryant.

Chief Justice Hughes delivered the opinion of the Court. Regarding the arguments that the Park District Act violated the Ohio constitution, the Court noted that “it is not for this Court to intervene to protect the citizens of the State from the consequences of its policy, if the State has not disregarded the requirements of the Federal Constitution” (p. 81). Addressing the issue of the unconstitutionality of the Ohio constitution, the Court pointed out that the constitutional requirement being attacked was “one operating uniformly throughout the entire State” (p. 81). The challenge to the validity of the state constitution “from a Federal standpoint” was found “to be without merit” (p. 79).

Regarding the Guarantee Clause argument presented by the plaintiff, the Court remarked:

As to the guaranty to every State of a republican form of government (Sec. 4, Art. IV), it is well settled that the questions arising under it are political,

not judicial, in character and thus are for the consideration of the Congress and not the courts. *Pacific States Telephone & Telegraph C. v. Oregon*, 223 U.S. 118; *O'Neill v. Leamer*, 239 U.S. 244, 248; *State of Ohio ex rel. Davis v. Hildebrant, Secretary of State of Ohio*, 241 U.S. 565; *Mountain Timber Co. v. State of Washington*, 243 U.S. 219, 234. (pp. 79-80)

Addressing the plaintiff's argument that the Park District Act violated the Fourteenth Amendment, the Court opined:

We do not consider it necessary to consider at length this objection, or the other points sought to be made against the statute under the Fourteenth Amendment, as, in view of the repeated decisions of this Court, we do not find any substantial Federal question presented. (p. 79)

Despite the Court's previous statement, the opinion subsequently addressed both the Due Process Clause and the Equal Protection Clause. According to the Court, "the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance" (p. 80). As the Court further noted,

The opportunity afforded to litigants in Ohio to contest all constitutional and other questions fully in the Common Pleas Court and again in the Court of Appeals plainly satisfied the requirement of the Federal Constitution in this respect and the State was free to establish the limitation in question in relation to appeals to its Supreme Court in accordance with its views of state policy. (p. 80)

Regarding the Equal Protection Clause, the Court pointed to previous rulings and summarized:

It has been held by this Court that the equal protection clause of the Fourteenth Amendment is not violated by diversity in the jurisdiction of the several courts of a State as to subject matter or finality of decision if all persons within the territorial limits of the respective jurisdictions of the state courts have an equal right in like cases under like circumstances to resort to them for redress. (p. 81)

The Court further clarified by observing that a state could theoretically establish one system of courts for rural areas and another court system for cities without violating requirements of the "Federal Constitution" (p. 81).

*Significance for the guarantee clause.*



*Ohio ex rel. Bryant v. Akron Metropolitan Park District* continues a line of cases citing *Pacific States* as being controlling upon claims based upon the Guarantee Clause whereby the Court refuses to take jurisdiction. However, this case possesses a different significance for this inquiry because it is the first case examined thus far whereby the Court does not automatically defer to the judgment of the state's supreme court, but investigates the legal situation and issues a ruling based upon its own inquiry.

***Cochran et al v. Louisiana State Board of Education, 281 U.S. 370 (1930).***

*Case summary.*

The Louisiana legislature enacted legislation in 1928 that provided tax monies for the purpose of “supplying school books to the school children of the State” (p. 374). The legislation further directed the State Board of Education to provide “school books for school children free of cost to such children” (p. 374).

Cochran and other Louisiana citizens filed suit requesting an injunction to stop the Louisiana State Board of Education from distributing free textbooks, purchased with public tax dollars, to children attending private schools. Plaintiffs argued that such use amounted to state aid for private schools that in turn constituted the “taking of private property for private purposes” in violation of the Fourteenth Amendment. Plaintiffs also argued that such a plan destroyed an essential part of republican government in violation of the Guarantee Clause.

If the principle upon which there is allowed a diversion of the public school funds for the benefit of private individuals, is sanctioned, then the division of the public school funds may be permitted, so that ultimately those whose children attend private schools, under the simulation of bearing the burden of taxation for the public schools, are paying for the maintenance only of their own private schools. This finally means, in effect, depriving the State of its power to tax (for the support of the public schools) those who support only their private schools – and practically the destruction of one of the free institutions under our republican form of government. (pp. 372-373)

The trial court refused to issue the requested injunction which decision was affirmed by the Supreme Court of Louisiana on appeal as the state's high court "held that these acts were not repugnant to either the state or the Federal Constitution" (p. 374). Having granted an appeal and having heard opposing arguments, Chief Justice Hughes announced the Court's decision.

Regarding the Guarantee Clause, the Chief Justice noted his own previous opinion on the issue.

No substantial Federal question is presented under section 4 of Article IV of the Federal Constitution guaranteeing to every State a republican form of government, as questions arising under this provision are political, not judicial, in character. *State of Ohio ex rel. Bryant v. Akron Metropolitan Park District*, ante, p. 74, and cases there cited. (p. 374)

Turning next to the claims arising under the Fourteenth Amendment, the Court quoted from the Louisiana Supreme Court's ruling that the Louisiana law was not objectionable under the Fourteenth Amendment: "The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries" (p. 375).

Immediately prior to announcing that the judgment of the Louisiana Supreme Court was affirmed, the Chief Justice concluded:

Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded. (p. 375)

*Significance for the guarantee clause.*

*Cochran v. Board of Education* continued a line of decisions begun with *Luther v. Borden* whereby questions arising under the Guarantee Clause are deemed nonjusticiable by the Court.

***Highland Farms Dairy, Inc. et al. v. Agnew et al., 300 U.S. 608 (1937).***

*Case summary.*

Although the case is referenced as *Highland Farms Dairy, Inc. v. Agnew*, the original suit was filed by Luther W. High who was joined by Highland. The legal dispute centered on the provisions of a Virginia statute referred to as the “Milk and Cream Act” that was enacted in 1934 (p. 609). The Virginia law, after reciting “demoralizing trade practices in the dairy industry” that threatened to “interrupt the supply of pure and wholesome milk for the inhabitants of the Commonwealth” and thereby create an “economic emergency,” created a “Milk Commission with power to create ... natural market areas, and to fix the minimum and maximum prices to be charged for milk and cream therein” (pp. 609, 610). Distributors were required to obtain a license, without which it was illegal to sell dairy products within the market area. Interstate commerce was exempted from the act’s provisions.

Highland Farms Dairy purchased milk from farmers in Maryland and Virginia before processing it and selling its “entire output of bottled milk” to Luther High for his retail stores in Virginia (p. 610). Highland was judged by the Milk Commission to be engaged in interstate commerce and thus exempt from the act even though it was selling milk products below the minimum prices established for the market area. High was also selling his products to consumers below the price established. High refused to get a license and kept selling at his below-market prices whereupon the “Commission gave notice to High that it would proceed against him for an injunction if he refused compliance with its orders” (p. 611). High then filed suit seeking to “enjoin enforcement of the Act” which was joined by Highland Farms Dairy (p. 611). Among other claims, plaintiffs argued that the act violated both the Virginia constitution

and the Guarantee Clause of the U.S. Constitution by unconstitutionally delegating legislative powers to the Milk Commission, a nonlegislative body.

According to Justice Cardozo, the U.S. District Court for the Eastern District of Virginia “gave judgment for the defendants, with a comprehensive opinion to which little can be added” (p. 611). Appeal of the District Court’s decision was granted by the Supreme Court. Justice Cardozo delivered the Court’s decision in which nine justices concurred in the judgment, but four justices dissented from the portion of the opinion attributing “to the State a power to fix minimum and maximum prices to be charged in the sale of milk” (p. 617). However, no separate opinions were presented.

Regarding the Constitutional issue, Justice Cardozo remarked:

The Constitution of the United States in the circumstances here exhibited has no voice upon the subject. The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we were dealing with an act of Congress. How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. (p. 612)

Having in effect declined federal intervention so that republican government in Virginia could be preserved, Cardozo next moved to explicit mention of the Guarantee Clause.

The statute is not a denial of a republican form of government. Constitution, Art. IV, § 4. Even if it were, the enforcement of that guarantee, according to the settled doctrine, is for Congress, not the courts. *Pacific States Telephone Co. v. Oregon*, 223 U.S. 118; *Davis v. Hildebrant*, 241 U.S. 565; *Ohio ex rel. Bryant v. Akron Park District*, 281 U.S. 74, 79, 80. (p. 612)

Regarding the argument that the Milk and Cream Act violated the Virginia constitution, Justice Cardozo pointed to the Virginia Supreme Court’s ruling in another case that found the Act not violative of the state’s constitution and ruled that “[a] judgment by the highest court of a state as to the meaning and effect of its own constitution is decisive and controlling everywhere”

(p. 613). The Court, noting that all arguments against the act had already been “summarized and answered,” affirmed the judgment of the District Court (p. 617).

*Significance for the guarantee clause.*

*Highland Farms Dairy v. Agnew* marks the first attempt by the Court to offer an opinion regarding the impact of the Guarantee Clause upon the legal issue; however, it then officially ruled to decline jurisdiction and thereby abide by the precedent first established in *Luther v. Borden* and continued since in an unbroken line of multiple cases extending through the decision in this case.

***Baker v. Carr, 369 U.S. 186 (1962).***

*Case summary.*

This case presents several features of interest. First, Chief Justice Earl Warren “called *Baker v. Carr* ‘the most vital decision’ during his service on the Court, and the apportionment revolution it inaugurated as the most important achievement of his Court” (Hall, 1999, p. 17). Such an assessment is quite remarkable, given that the vast majority of the public is more familiar with *Brown v. Board of Education* and probably regards that decision as the Warren Court’s most significant accomplishment. No movies, dramatic presentations, or television specials have emerged that focus exclusively on *Baker v. Carr*. Neither is *Baker v. Carr* associated with any great socio-political movement. Nor was the lead attorney who argued the case subsequently appointed to the Supreme Court.

Second, six of the eight justices who heard the case wrote opinions. Justice Whittaker didn’t participate because of health concerns and would shortly announce his resignation from the Court because of “physical exhaustion” (Hall, 1992, p. 930). Interestingly, Chief Justice Warren and Justice Black were the only participating justices not authoring an opinion. Justice

Brennan wrote the opinion for the 6-2 majority while Justices Douglas, Clark, and Stewart wrote separate concurring opinions. Justices Frankfurter and Harlan wrote separate dissenting opinions in which each concurred with the other.

Third, while the case was not argued on the basis of the Guarantee Clause, five of the six written opinions specifically mentioned the Constitutional guarantee of republican government. Justices Brennan, Douglas, Clark, Frankfurter, and Harlan each addressed the Guarantee Clause in their remarks. Although the case was argued under the Equal Protection Clause of the Fourteenth Amendment, Justice Frankfurter characterized the case as “in effect, a Guarantee Clause claim masquerading under a different label” (p. 297).

Fourth, *Baker v. Carr* represented, according to Justice Clark, one of the “most carefully considered” decisions of the Supreme Court, one in which the Court gave “detailed study” to the problematic issues involved (pp. 258, 261). The case was before the Court for two years, was first argued on April 19-20, 1961 for three hours, was reargued on October 9, 1961, for another three hours, and was decided on March 26, 1962, after “over six hours’ argument (three times the ordinary case)” as well as having been “considered over and over again by us in Conference and individually” (p. 258).

Fifth, the newly elected Kennedy administration filed an amicus curiae brief urging reversal of the district court decision through its Solicitor General, Archibald Cox.<sup>25</sup> During the reargument of the case, Cox “reargued the cause for the United States” by “special leave of Court, 365 U.S. 864” (p. 187).

The legal dispute centered on apportionment. Baker as well as other plaintiffs living in Knoxville, Memphis, and Nashville filed action in the U.S. District Court for the Middle District of Tennessee against Joseph Cordell Carr, secretary of state for Tennessee, and George

McCanless, the Tennessee attorney general. In their suit the plaintiffs argued that they “and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes” (pp. 187-188). Under Tennessee’s Constitution, the legislature was required to apportion the members of the state legislature among Tennessee’s ninety-five counties following each decennial census. However, the last time the legislature fulfilled the constitutional obligation was 1901. Even that measure was flawed, according to the plaintiffs, because it failed to provide municipal voters with their fair share of seats. Plaintiffs noted that the state courts had refused to become involved in subsequent years, thus leaving the federal courts as the only forum that might provide any relief. They asked the court to declare the Tennessee Apportionment Act of 1901 unconstitutional and to issue an injunction prohibiting state officials from conducting future elections under its auspices. Justice Brennan provided greater insight into the plaintiffs’ constitutional argument when he summarized their position in the Court’s majority opinion:

Their constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State’s Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties. A citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution... (pp. 207-208)

The district judge convened a three-judge district court to hear the case after reviewing several Supreme Court decisions and determining that justification existed for convening such a court (175 F. Supp. 649). This three-judge district court dismissed the complaint, ruling that they didn’t have jurisdiction under Article III of the Constitution or the federal statutes implementing Article III that outlined the scope of judicial power. In addition, the three-judge

federal court noted that even if they had jurisdiction, the questions presented by the plaintiffs were political and therefore nonjusticiable.

The Court granted direct appeal of the district court's decision. In its ruling the Court held "that the District Court has jurisdiction of the subject matter of the federal constitutional claim asserted in the complaint" and "that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief" (pp. 204, 198). The State of Tennessee argued that apportionment could involve a constitutional right only if it rested on the Guarantee Clause and that such complaints had previously been held by the Court to "present political questions which are nonjusticiable" (p. 209). Responding to Tennessee's argument, the Court stated:

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause.... Appellants' claim that they are being denied equal protection is justiciable, and if "discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Snowden v. Hughes*, 321 U.S. 1, 11. (pp. 209-210)

Concluding that "[t]he right asserted is within the reach of judicial protection under the Fourteenth Amendment," the Court reversed the District Court's judgment and remanded the cause "for further proceedings consistent with [the Court's] opinion" (p. 237).

Describing the impact of the case in terms of subsequent actions, a constitutional scholar noted its significance.

It did not take long for other states to go through the door opened by *Baker v. Carr*. In one year, thirty-six states had become involved in reapportionment lawsuits. During the next several years the Court rounded out the reapportionment revolution. The judges quickly retreated from the "rationality test" – that apportionment plans were to be evaluated in terms of whether or not they had any rational basis – to what many think to be a simplistic but nonetheless more manageable standard of mathematical strict equality – one person, one vote. Within a short time the Court had concluded that no factors ... but strictly equal population districts would pass constitutional muster. (Hall, 1999, p. 20)



*Significance for the guarantee clause.*

*Baker v. Carr* presented multiple items of interest for the Guarantee Clause of which both scholars and litigants need to be cognizant. Unique to this case in both breadth and depth, the justices focused on the following topics pertinent to the Guarantee Clause:

- Types of dismissal of cases by the Court;
- Federal district court jurisdictional boundaries.
- Criteria for political questions;
- Justiciability of Guarantee Clause claims; and the
- Status of Congress regarding the Guarantee Clause.

Of course, the majority opinion dwelt at length with *Luther v. Borden*. *Luther* also drew comments from other justices in their opinions. The majority opinion as well as an analysis by a constitutional scholar suggests a limiting of *Luther's* influence in modern constitutional jurisprudence. Finally, two topics of interest remain. The first arises from the majority opinion's questionable rationale that what is nonjusticiable under the Guarantee Clause suddenly becomes justiciable under the Fourteenth Amendment. The second concerns the justices' contrasting views of the role of the courts in American jurisprudence. The topics will be discussed in the order just presented. The reader should bear in mind that the issues of political questions, justiciability, and congressional status vis-à-vis the Guarantee Clause intertwine with each other; nevertheless, an attempt will be made to distinguish the main features of each as presented in the various opinions contained within *Baker v. Carr*.

In reviewing the District Court's order of dismissal, Justice Brennan noted "two possible reasons for dismissal" – "lack of jurisdiction of the subject matter" and "failure to state a justiciable cause of action" (p. 196). The problem for the Court arose from the District Court's

use of both “without attempting to distinguish between these [two] grounds” (p. 196). In discussing these two possibilities, Justice Brennan also articulated a third reason for court dismissal of a case – lack of standing by plaintiff to litigate a cause. The Court pointed out that the three-judge panel did not doubt that constitutional rights had been violated as the following portion of the court’s ruling demonstrates.

With the plaintiffs’ argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay. But even so the remedy in this situation clearly does not lie with the courts. It has long been recognized and is accepted doctrine that there are indeed some rights guaranteed by the Constitution for the violation of which the courts cannot give redress. 179 F. Supp., at 828. (p. 197)

The Supreme Court ruled that the lower court erred in resting its ruling on any of the three possible reasons for dismissing a case (the two announced in the District Court ruling, the third presented by the State of Tennessee in its arguments before the Supreme Court). The Court announced its holding:

In light of the District Court’s treatment of the case, we hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes. (pp. 197-198)

In explaining its holding that the lower court possessed jurisdiction, the Supreme Court reviewed the jurisdictional boundaries of federal district courts as delineated by Article III, § 2 of the Constitution and by “the power of Congress to assign to the jurisdiction of the District Courts” according to Article III, § 2. The Court explicitly quoted from 28 U.S.C. § 1343 (3) in its ruling:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person ... [t]o redress the

deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States.... (p. 200)

In a footnote, the Court noted further jurisdictional implications by quoting from 42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (p. 200, n. 18)

In explaining why it rejected Tennessee's argument that apportionment claims were based on the Guarantee Clause, the Court noted that it was "necessary first to consider the contours of the 'political question' doctrine" (p. 210). According to the majority opinion, "The nonjusticiability of a political question is primarily a function of the separation of powers" (p. 210). Justice Brennan continued:

Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. (p. 211)

The Court proceeded to examine various governmental issues "to infer from them the analytical threads that make up the political question doctrine" (p. 211). After examining questions related to foreign relations, dates regarding the start and conclusion of hostilities, validity of enactments, and the status of Indian tribes, the Court summarized the elements of political questions which arose, in the Court's view, over issues related to the separation of powers. The Court identified six elements or "analytical threads" of political questions:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and

manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. (p. 217)

Cautioning that courts needed to conduct a “discriminating inquiry into the precise facts and posture of the particular case,” and noting that it was impossible to resolve the determination of whether or not a political question was involved by “any semantic cataloguing,” the Court summarized its position *vis-à-vis* political questions:

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of “political questions,” not one of “political cases.” The courts cannot reject as “no law suit” a bona fide controversy as to whether some action denominated “political” exceeds constitutional authority. (p. 217)

According to the Court, previous Guarantee Clause cases had involved “those elements which define a ‘political question’ and for that reason and no other, they (were) nonjusticiable” (p. 218). Later in the opinion, the Court reiterated that “it is the involvement in Guaranty Clause claims of the elements thought to define ‘political questions,’ and no other feature, which ... render[ed] them nonjusticiable” (p. 229).

Justice Frankfurter's dissenting opinion defined political questions as constituting “a class of controversies which do not lend themselves to judicial standards and judicial remedies” (p. 280). To call them political questions was, in Frankfurter's judgment, to state a conclusion rather than to conduct an analysis. Justice Frankfurter offered his own category of reasons for noninvolvement of the federal judiciary, not all of which pertained to the Guarantee Clause. Two, however, seem pertinent. The first reiterated one of the majority opinion's reasons for

judicial noninvolvement in Guarantee Clause cases, “the lack of satisfactory criteria for a judicial determination” (p. 283, quoting Chief Justice Hughes’ opinion in *Coleman v. Miller*, 307 U.S.

433, 454-455). According to Justice Frankfurter:

A controlling factor in such cases is that, decision respecting these kinds of complex matters of policy being traditionally committed not to courts but to the political agencies of government for determination by criteria of political expediency, there exists no standard ascertainable by settled judicial experience or process by reference to which a political decision affecting the question at issue between the parties can be judged. (p. 282)

Justice Frankfurter’s second reason for nonjusticiability applies to other cases as well, but hasn’t been explicitly explained in previous cases examined thus far. It deals with what Frankfurter described as the Court’s refusal “to exercise its jurisdiction to pass on ‘abstract questions of political power, of sovereignty, of government’” (p. 286, quoting from *Massachusetts v. Mellon*, 262 U.S. 447, 485). Justice Frankfurter provided further elucidation.

The “political question” doctrine, in this aspect, reflects the policies underlying the requirement of “standing”: that the litigant who would challenge official action must claim infringement of an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general frame and functioning of government – a complaint that the political institutions are awry. (pp. 286-287)

Since the issue of political questions and the Guarantee Clause originated with *Luther v. Borden*, Justice Brennan conducted a thorough review of that case in examining the issue of justiciability. After devoting five pages to an examination of *Luther v. Borden*, the Court appeared to narrow the significance of the Taney Court’s ruling upon Guarantee Clause claims:

But the only significance that *Luther* could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State’s lawful government. (p. 223)

However, in a separate note, Justice Brennan suggested that the absence of standards might not be a hindrance. He opined that “the judiciary might be able to decide the limits of the meaning

of ‘republican form,’ and thus the factor of criteria might fall away...” (p. 223, n. 48).

According to a professor of constitutional law, Justice Brennan reinforced such an interpretation by citing “indices that earlier Courts have deemed requisites of republican government” (Bonfield, 1962, p. 248).

Arthur E. Bonfield, professor of law at the University of Iowa, noted an important distinction regarding the holding in *Luther v. Borden* that sheds light on the case law springing from *Luther*. He pointed out that the holding in *Luther* was actually quite narrow, but that additional discussion in the opinion not directly related to the finding (i.e., dicta) became the focal point for subsequent case law.

Therefore, despite dicta to the contrary, *Luther* does not hold that the guarantee is solely enforceable by Congress. Rather, its holding is only that the particular determination there involved resided with the President. But in line with the dicta in *Luther* and the holdings of later cases relying thereon, Justice Brennan seems convinced that the guarantee’s enforcement is exclusively committed to Congress. (Bonfield, 1962, p. 249)

Professor Bonfield also observed that the holding in *Luther* does not lend support to an interpretation that any enforcement of the Guarantee Clause is committed to Congress since the “unique determination required in *Luther* was exclusively delegated to the President” (Bonfield, 1962, p. 248). He continued:

The latter clauses of article IV, section 4, and a statute enacted in 1795 conferred on the President the exclusive power to decide which of two competing state governments was legitimate and lawful. He was to curb insurrection by calling forth the militia on application of the proper governmental authority of a state. As a result, the obligation had been impliedly placed on him to “determine what body of men constitute the legislature, and who is the governor, before he can act.” While the President never actually summoned the militia, he did recognize the old governor as the executive power of Rhode Island. (Bonfield, 1962, pp. 248-249)

Examination of the Guarantee Clause reveals the lack of any textual support that would suggest exclusive enforcement of that clause by Congress. Yet Justice Brennan made an

incredible and solitary leap from exclusive enforcement of the Guarantee Clause by Congress to an assertion that “challenges to congressional action on the ground of inconsistency with [the Guarantee Clause] ... present no justiciable question” (p. 224). Such a leap was solitary because two other sitting justices denied such an interpretation. In a separate concurring opinion, Justice Douglas disavowed both interpretations:

The statements in *Luther v. Borden*, 7 How. 1, 42, that this guaranty is enforceable only by Congress or the Chief Executive is not maintainable. Of course the Chief Executive, not the Court, determines how a State will be protected against invasion. Of course each House of Congress, not the Court, is “the Judge of the Elections, Returns, and Qualifications of its own Members.” Article I, Section 5, Clause 1. But the abdication of all judicial functions respecting voting rights (7 How., at 41), however justified by the peculiarities of the charter form of government in Rhode Island at the time of Dorr’s Rebellion, states no general principle. It indeed is contrary to the cases discussed in the body of this opinion – the modern decisions of the Court that give the full panoply of judicial protection to voting rights. Today we would not say with Chief Justice Taney that it is no part of the judicial function to protect the right to vote of those “to whom it is denied by the written and established constitution and laws of the State.” *Ibid.* (p. 242, n. 2)

Justice Douglas continued by quoting from Justice Woodbury’s dissenting opinion in *Luther v.*

*Borden*:

It would be alarming enough to sanction here an unlimited power, exercised either by legislatures, or the executive, or courts, when all our governments are themselves governments of limitations and checks, and of fixed and known laws, and the people a race above all others jealous of encroachments by those in power. (p. 243, n. 2)

Dismissing any notion of congressional infallibility or immunity from judicial review of that body’s actions under the Guarantee Clause, Justice Douglas cited a federal court judge’s ruling from *Dyer v. Kazuhisa Abe*, 138 F. Supp. 220, 236:

The whole thrust of today’s legal climate is to end unconstitutional discrimination. It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the Constitution. The legislatures of our land should be made as

responsive to the Constitution of the United States as are the citizens who elect the legislators. (p. 249)

Justice Frankfurter also disagreed with any interpretation whereby the enforcement of the Guarantee Clause was committed to Congress: “Art. IV, § 4, is not committed by express constitutional terms to Congress. It is the nature of the controversies arising under it, nothing else, which has made it judicially unenforceable” (p. 297).

Having studied the intersection of the Guarantee Clause and Congress and having written articles discussing this issue, Professor Bonfield noted that the American system of federalism opposed any abstinence from judicial review of congressional action, particularly under the Guarantee Clause.

For judicial abstinence would give Congress unlimited power to impose on the states whatever government it deemed republican. Not only would such authority spell the complete end of our federal system, but it would create an unchecked power capable of destroying rather than guaranteeing republican government. (Bonfield, 1962, January, pp. 564-565)

While a court might refrain from enforcing the Guarantee Clause, such a course of action did not preclude judicial review of attempts by the other branches to enforce the Clause.

For this reason [preventing the possibility of congressional tyranny], though the Court might refuse to enforce the guarantee on its own initiative, it would review the legitimacy of any congressional attempt to do so. In such a case, it would be only performing its usual function of keeping the legislature within those powers actually conferred ... (Bonfield, 1962, January, p. 565).

Bonfield concluded, “As a result, any congressional enforcement of the guarantee clause will be subject to judicial scrutiny” (Bonfield, 1962, January, p. 565).

Siding with Justices Douglas and Frankfurter in disagreeing with Justice Brennan’s views of congressional status regarding the Guarantee Clause, Professor Bonfield criticized not only the results of Justice Brennan’s reasoning, but also the assumptions made and the cases used to



support what Bonfield viewed as an illogical interpretation. Regarding the assertion of congressional immunity regarding the Guarantee Clause, Bonfield pointed out:

The cases he cites to support this last proposition are wholly inapposite, for they were grounded in the unique circumstances of the Reconstruction of the South in the aftermath of the Civil War. Only in a footnote is it admitted that the “implication of the Guaranty Clause in a case concerning congressional action does not always preclude judicial action.” (Bonfield, 1962, p. 249)

He continued by illustrating the consequences of such an interpretation by Justice Brennan:

Certainly his textual references could not have meant to convey the impression that all congressional action allegedly pursuant to the guarantee was unreviewable. Such a doctrine would be disastrous, since it would leave in Congress an unfettered and unchecked power capable of destroying all republican government. (Bonfield, 1962, p. 249)

As Bonfield explained in a footnote, “To free any action from judicial scrutiny, all Congress need do is assert that it was acting pursuant to the guarantee” (Bonfield, 1962, p. 249, n. 32).

Bonfield also criticized Justice Brennan’s opinion that the enforcement of the Guarantee Clause is an exclusively congressional responsibility.

And his initial assumption that the clause is enforceable in the first instance solely by Congress is as questionable as his further assumption that the Court is impotent to review Congressional action thereunder. This conclusion becomes obvious when it is realized that no “textually demonstrable constitutional commitment of the issue to a coordinate political department” exists here. (Bonfield, 1962, pp. 249-250)

In his dissenting opinion, Justice Frankfurter disagreed with the majority opinion’s restricted view of *Luther v. Borden*. Justice Frankfurter’s dissent also disagreed with the separate concurring opinions written by Justices Douglas and Clark regarding justiciability of claims regarding constitutional violations of constitutional guarantees. Justice Frankfurter’s comments provide a contrasting view of *Luther v. Borden*, one that had held judicial sway for over a century.

The influence of these converging considerations – the caution not to undertake decision where standards meet for judicial judgment are lacking, the reluctance to interfere with matters of state government in the absence of an unquestionable and effectively enforceable mandate, the unwillingness to make courts arbiters of the broad issues of political organization historically committed to other institutions and for whose adjustment the judicial process is ill-adapted – has been decisive of the settled line of cases, reaching back more than a century, which holds that Art. IV, § 4, of the Constitution, guaranteeing to the States “a Republican Form of Government,” is not enforceable through the courts. (p. 289)

Somewhat troublesome is the majority opinion’s view that the claims of this case are justiciable under the Equal Protection Clause of the Fourteenth Amendment, but that the same claims are not justiciable under the Guarantee Clause.

We conclude then that the nonjusticiability of claims resting on the Guaranty Clause which arises from their embodiment of questions that were thought “political,” can have no bearing upon the justiciability of the equal protection claim presented in this case. (p. 228)

It can only be surmised that such a conclusion is arrived at through semantic posturing, or by following the dicta in the *Luther* opinion, or both. Justice Brennan observed for the majority:

This case does, in one sense, involve the allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile. But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender. (pp. 226-227)

And then, immediately following, is a statement whereby the majority justices acknowledge that the current case does not present a political question.

True, it must be clear that the Fourteenth Amendment claim is not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself. But we have found that not to be the case here. (p. 227)

The immediate question springing to mind after such a statement – “If there is no political question, why not involve the Guarantee Clause?” Perhaps the Guarantee Clause had an

unsavory reputation in judicial circles in that, despite protestations to the contrary, any claim presented under the Guarantee Clause was deemed to involve “political” questions and thus be nonjusticiable. Perhaps the Guarantee Clause represented a judicial Gordian Knot to the majority justices that was too complicated to unravel. A much easier task would be to disavow any connection with the Guarantee Clause and proceed to examine the case according to its merits under another constitutional provision. According to Justice Brennan:

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause.... Appellants’ claim that they are being denied equal protection is justiciable, and if “discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.” *Snowden v. Hughes*, 321 U.S. 1, 11. (pp. 209-210)

Justice Frankfurter also had problems with the majority opinion’s “nonjusticiable under the Guarantee Clause, but justiciable under the Equal Protection Clause” argument. According to Justice Frankfurter, “[E]qual protection’ is no more secure a foundation for judicial judgment of the permissibility of varying forms of representative government that is ‘Republican Form’” (pp. 300-301). Justice Frankfurter next noted the nexus between the Equal Protection Clause and a republican form of government:

For a court could not determine the equal-protection issue without in fact first determining the Republican-Form issue, simply because what is reasonable for equal-protection purposes will depend upon what frame of government, basically, is allowed. To divorce “equal protection” from “Republican Form” is to talk about half a question” (p. 301)

A professor of constitutional law well versed in the Guarantee Clause characterized as “incongruous” the majority opinion’s formulation of “justiciable when presented under the equal protection clause, but nonjusticiable when raised under the guarantee” (Bonfield, 1962, p. 252). He continued:

[N]or are there greater difficulties under this provision [the Guarantee Clause] in defining the criteria necessary for judicial enforcement than there are under the fourteenth amendment. As a result, an issue raised under the guarantee should be deemed “political” solely if it is burdened with some of the other elements Justice Brennan notes. An issue cognizable under the fourteenth amendment, as that in *Baker v. Carr*, must therefore, as a logical proposition, be so under the guarantee. (Bonfield, 1962, p. 252)

Of final interest, this case revealed a fundamental fault-line between contrasting views of the role of courts in America’s experiment with republican government. Should the courts strive for equality or should they exhibit self-restraint and not become involved in controversial issues? Justices Harlan and Frankfurter argued for the latter while Justices Clark and Douglas favored the first proposition. Justice Harlan stated the case for restraint from controversy:

[I]t is appropriate to say that one need not agree, as a citizen, with what Tennessee has done or failed to do, in order to deprecate, as a judge, what the majority is doing today. Those observers of the Court who see it primarily as the last refuge for the correction of all inequality or injustice, not matter what its nature or source, will no doubt applaud this decision and its break with the past. Those who consider that continuing national respect for the Court’s authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication, will view the decision with deep concern. (pp. 339-340)

Justice Frankfurter’s agreement with Justice Harlan’s view of the Court’s role can be seen in the following:

Disregard of inherent limits in the effective exercise of the Court’s “judicial Power” not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court’s position as the ultimate organ of “the supreme Law of the Land” in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. (p. 267)

Both justices were concerned with the public’s view of the Court. Justice Frankfurter concluded:

The Court’s authority – possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and

in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements. (p. 267)

Justices Clark and Douglass would agree with the first sentence of the previous citation, but would strongly disagree with a policy of abstention from controversy on what they regard as fundamental issues. Justice Clark drew sustenance for his view of the Court's role in America's scheme of government from a participant in the Constitutional Convention who later served as Chief Justice of the Supreme Court.

As John Rutledge (later Chief Justice) said 175 years ago in the course of the Constitutional Convention, a chief function of the Court is to secure the national rights. Its decision today supports the proposition for which our forebears fought and many died, namely, that to be fully conformable to the principle of right, the form of government must be representative. That is the keystone upon which our government was founded and lacking which no republic can survive. (pp. 261-262)

While "self-restraint and discipline in constitutional adjudication" is an admirable practice, it must not blind the Court to the point of sanctioning the infringement of "national rights" (p. 262). Justice Clark concluded:

National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court. (p. 262)

Justice Douglas strongly believed in protecting the individual rights necessary for a republican form of government to flourish, even to the extent of implying that *Luther v. Borden* and its subsequent case law constituted a judicial mistake.

I feel strongly that many of the cases cited by the Court and involving so-called "political" questions were wrongly decided. In joining the opinion, I do not approve those decisions but only construe the Court's opinion in this case as stating an accurate historical account of what the prior cases have held. (p. 241, n. 1)

It is instructive of his position that one of the opinions he selected to cite in his concurring opinion came from an apportionment case previously reversed by a federal appeals court and not reviewed by the Supreme Court, a decision that would have been upheld if it had been reached subsequent, instead of prior, to *Baker v. Carr*. Justice Douglass approvingly quoted from Judge McLaughlin's original decision: "The whole thrust of today's legal climate is to end unconstitutional discrimination. It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired" (p. 249).

The debate surrounding this fault-line continues today in another guise, that of judicial activism. However, the opposing positions were clearly defined in the multiple opinions contained within *Baker v. Carr*. A belief in the position articulated by Justices Clark and Douglass also motivated the stirring dissents of Justice Harlan's grandfather, Justice John Marshall Harlan, particularly his dissent in *Plessy v. Ferguson* reviewed in a later section of this chapter.

**The guarantee clause prohibits federal intervention so that the state continues to have a republican government.**

*Forsyth v. Hammond, 166 U.S. 506 (1897).*

*Case summary.*

The dispute arose over the City of Hammond's desire to annex the plaintiff's land and involved actions, some of which were simultaneous, in both state and federal courts. Indiana state law authorized "the annexation of contiguous territory to the limits of a city with or without the consent of the owner" (p. 507). The city council of Hammond approved the annexation, the county commissioners of Lake County denied the application, the city appealed to the Circuit Court of Lake County where it was transferred to the Circuit Court of Porter County which conducted a jury trial that determined in favor of the city's annexation. Following this action,

the city levied taxes on the plaintiff's property whereupon she filed for an injunction to restrain the collection of taxes with the U.S. Circuit Court for the District of Indiana. The Circuit Court denied the motion for injunction and dismissed the suit, and the plaintiff appealed to the Court of Appeals for the Seventh Circuit which reversed the lower court's decision. This time the city of Hammond successfully applied to the U.S. Supreme Court for a certiorari directed to the Court of Appeals for the Seventh Circuit. In the meantime, the plaintiff and others had appealed the decision of the Circuit Court of Porter County to the Supreme Court of Indiana, which upheld the decision of the lower state court.

Justice Brewer delivered the opinion of the majority and asked, "Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction" (p. 517)? Answering his own question, the Justice noted that the concept of *res judicata* (a common law principle whereby final judgment by an appropriate court concludes the rights of all parties in subsequent litigation involving the same issues already resolved [Hall, 1992, p. 730]) applied to the situation "in all its force" (p. 517). He also observed that the subject matter was one "peculiarly within the domain of state control" (p. 518).

It is for the State to determine its political subdivisions, the number and size of its municipal corporations and their territorial extent. These are matters of a local nature, in which the nation, as a whole, is not interested, and in which, by the very nature of things, the determination of the state authorities should be accepted as authoritative and controlling. (p. 518)

He noted, "The construction by the courts of a State of its constitution and statutes is , as a general rule, binding on the Federal courts" (p. 518) The decision of the Court of Appeals for the Seventh Circuit was reversed, and the case was remanded to the U.S. Circuit Court for the District of Indiana with instructions to dismiss the case.

*Significance for the guarantee clause.*

Justice Brewer cited the Guarantee Clause as providing for two courses of action. First, the Clause did not prohibit state citizens from giving jurisdiction of territorial boundaries to the state courts and removing such jurisdiction from the legislature as the “preservation of legislative control in such matters is not one of the essential elements of a republican government...” (p. 519). But the clause did impose a limit on the federal judiciary:

And whenever the Supreme Court of a State holds that under the true construction of its constitution and statutes the courts of that State have jurisdiction over such matters, the Federal courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the Federal Constitution. (p. 519)

***United States v. Downey, 195 F.Supp. 581 (1961).***

*Case summary.*

William Downey, a secretary in the governor’s office of the State of Illinois, was indicted by a federal grand jury “for evasion of income taxes” for each of the years from 1953 through 1956. In his trial before the U.S. District Court for the Southern District of Illinois, the Attorney General of Illinois and the State’s Attorney of Sangamon County, Illinois intervened and “filed a motion for disclosure” of the federal grand jury proceedings by which Downey had been indicted. In their motion they claimed authority under Federal Rule of Criminal Procedure 6(e) that states: “Disclosure of matters occurring before the Grand Jury other than its deliberations, and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties” (p. 583). Both state officials claimed they were government attorneys and thus covered by the provisions of the act. This cited case, therefore, is the ruling of the federal district court on the “motion for disclosure of grand jury proceedings to parties who intervened in a criminal proceeding” (p. 581).



District Judge Poos pointed out that the grand jury proceedings dealt with violations of “criminal laws of the United States, and not with criminal offenses against the laws of a State” (p. 583). After reviewing the Federal Rules of Criminal Procedure, Judge Poos noted that the rules pertained to “proceedings in the courts of the United States, and none other” (p. 584). Continuing, he then ruled that the phrase in Rule 6(e), “to the attorneys for the government for use in the performance of their duties,” clearly referred to “and could only mean attorneys for the United States Government, and not the attorneys of any county or state government” (p. 584). Clarifying his reasoning, Judge Poos explained:

If this were not true, and if Congress or the United States Supreme Court could make rules for criminal procedure in the State courts, then one would have to disregard the provisions of Article IV, Sec. 4 of the Constitution of the United States, which provides: “The United States shall guarantee to every State in this Union a Republican Form of Government ...” (p. 585)

Poos then held, “A republican form of government includes the right to have a system of state courts” (p. 585). Explaining further the basis of his holding, Judge Poos noted:

The rule is aptly stated in 11 Am.Jur., Sec. 174, page 870, as follows: “Among the matters which are implied in the Federal Constitution, although not expressed therein, is that the National Government may not, in the exercise of its powers, prevent a state from discharging its ordinary functions of government. This corresponds to the prohibition that no state can interfere with the free and unembarrassed exercise by the Federal Government of all powers conferred upon it. In other words, the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.” (p. 585)

Because the Illinois officials presented “no factual basis” to support their motion and because of the “strength of the authorities above cited,” Judge Poos denied the motion to release federal grand jury transcripts to state officials (p. 588).

*Significance for the guarantee clause.*

In this instance the Guarantee Clause justified the noninterference of the federal government with the state court system. This ruling was reached through the district court judge's rephrasing of the issue by illustrating the effect that would have been generated had he granted the motion made in federal court by state officials.

***Lance v. Plummer, 353 F.2d 585 (1965); 384 U.S. 929 (1966) (Black, J., joined by Harlan, J., dissenting).***

*Case summary.*

On the face of it, the case did not concern itself with the constitutional issues surrounding federalism in either the arguments presented in court or in the rulings issued by the court. The Guarantee Clause as a constitutional issue, however, was raised by Justice Black in his dissent regarding the Court's refusal to review the case as decided by the District Court for the Middle District of Florida and modified by the Fifth Circuit Court of Appeals.

The case originated in St. Augustine, Florida on issues surrounding the public accommodations requirements of the Civil Rights Act of 1964. Lucille Plummer and seven other individuals filed for injunctive relief against numerous restaurant and motel owners and managers from interfering with their efforts to avail themselves of public accommodations guaranteed by the Civil Rights Act of 1964. The district court judge determined that violations of the Civil Rights Act had occurred and issued the injunction. Subsequent to the injunction, Charles Lance, Jr., in his capacity as an unpaid volunteer deputy sheriff for St. Johns County violated the injunction in collaboration with the manager of a motel and restaurant complex. The district court, upon determination that Lance had violated the injunction, fined Lance \$200 for civil contempt, ordered him to obey all terms of the injunction, directed him to resign his position of volunteer deputy sheriff, and ordered Lance to surrender his badge and police equipment to his superiors in the sheriff's office of St. Johns County, Florida.

Lance appealed the decision to the United States Court of Appeals, Fifth Circuit who affirmed the district court rulings except for the order for Lance to resign his position. The Fifth Circuit Court of Appeals modified this provision, stating that it was appropriate to order Lance to surrender his badge “and cease his functions as a peace officer so long as he continues” to violate the injunction (p. 592). However, the court had to provide opportunity for Lance to repent of his actions and, upon proof to the court of compliance with the injunction, to resume his volunteer status with the sheriff’s office. Lance appealed the Circuit Court’s ruling to the U.S. Supreme Court which refused, without comment from the majority, to hear the case. Justice Black, joined by Justice Harlan, dissented in a written opinion.

Justice Black concerned himself primarily with the district court judge’s attempts to lay down the law, prosecute violators, pass judgment on alleged violators, and impose punishment as the judge “sees fit” – all of this proceeding not from a jury trial with constitutional guarantees, but from a summary contempt proceeding (p. 931).

To give federal judges such authority not only seems completely out of place in our federal form of government but also comes perilously close to violating the constitutional obligation of the Federal Government to guarantee to every State a republican form of government. ...I cannot help but believe that the legislators who passed the Civil Rights Act of 1964 will be greatly surprised if not shocked to learn that by passage of that law they empowered federal judges to remove state officers without even giving these impeached officers a trial by jury. Federal courts have heretofore been reluctant to exercise equity powers to interfere with a State’s governmental operations. (p. 931)

Justice Black concluded his dissent with a discussion of the possible ramifications and by drawing a parallel with a recent Court decision regarding a characteristic of a republican government.

I regret that the Court refuses to review this case in order to make it clear to all the people just how far this new contempt power of federal judges goes. ...If federal judges can remove deputy sheriffs why not sheriffs, members of

the state legislatures, state judges, and why not even state governors? ...In order to protect the rights of citizens to vote in state elections this Court recently announced the constitutional principle of “one person, one vote.” It seems a little early to graft onto that principle a new one giving United States judges the power to remove state officials chosen by the people in strict accordance with the “one person, one vote” principle. (p. 932)

*Significance for the guarantee clause.*

Justices Black and Harlan defined republican government as one in which state laws govern the removal of officials from state offices. The removal of state officials from office by the federal government would work to destroy a fundamental aspect of republican government for the states in violation of the Guarantee Clause. They believed that the Court missed an opportunity to breathe life into the Guarantee Clause.

***Bauers v. Heisel, 361 F.2d 581 (1966); 386 U.S. 1021 (1966).***

*Case summary.*

This case presents an example of litigation whereby constitutional issues were not argued in the first instance, but the facts gave rise to another legal action wherein the constitutional issue was presented in either argument or in the opinion. Therefore, in order to understand the context for the second action at law, it is necessary to understand the facts of the first case.

The facts of the case arose from an “almost bizarre and complex factual background” that went back to the early 1950’s (p. 583). As a teenager, William J. Bauers, Jr., escaped from a New Jersey reformatory in October 1950 and engaged in a crime spree in both Hunterdon and Essex Counties, New Jersey, before being apprehended by law enforcement officials. Bauers was charged with “assault with intent to rob and auto larceny” to which he pleaded *non vult* in Essex County Court. Bauer was then sentenced to serve four to six years on each count.

During this same time period (January 1951) the grand jury for the county in which the reformatory was located (Hunterdon County) indicted Bauers for “escape from the reformatory

and auto larceny” (p. 583). However, the case was not actually tried in Hunterdon County Court until May 1953 at which time he pleaded guilty and was sentenced to serve two to three years concurrently with the sentence given by the Essex County Court.

Bauers completed serving the Hunterdon County sentence before being released on parole on the Essex County sentences. In February 1963 Bauers filed an action in Hunterdon County Court to have the 1951 indictments against him dismissed and to have the sentences imposed by the court vacated on the grounds that, being a juvenile when the offenses were committed, the Hunterdon County Court indictments were illegal. The Hunterdon County Court denied Bauers’ application for dismissing the indictments and vacating the resulting sentence. However, the Appellate Division of the Superior Court of New Jersey reversed the lower court’s ruling and held that “since Bauers was not eighteen years old when the offenses were committed, jurisdiction over him was lodged exclusively in the Juvenile and Domestic Relations Court” (p. 583). The court’s ruling declared the indictments illegal and ordered that the resulting guilty plea and imposed sentences “should be expunged from the record” (p. 584).

Following the appellate court’s ruling, Bauers initiated civil action in U.S. District Court for the District of New Jersey against Hunterdon County Prosecutor, Herbert T. Heisel, Jr., for deprivation of his civil right of liberty under Sections 1979 and 1083 of the Third Civil Rights Act of 1871. The federal district court dismissed the complaint. Bauers appealed to the U.S. Third Circuit Court of Appeals who agreed to hear the case.

The holding in the second legal action was that judicial (in this instance, state prosecutors) officers of the state are immune from liability under the Civil Rights Act of 1871, in part, because of the Guarantee Clause. Following the Court of Appeals ruling, Bauers appealed to the U.S. Supreme Court who denied a writ of certiorari on an 8-1 vote. Justice Douglas

dissented from the majority, but didn't offer a written opinion. Because of the writ's denial by the Court, the opinion by the federal circuit court stood as controlling on the issues raised within the court's jurisdiction and as influential in other federal jurisdictions.

According to the opinion of the 7-2 majority of the Third Circuit of Appeals:

The framers of the Constitution clearly evinced their belief that a separate and independent judiciary is an indispensable element of a republican form of government. See *The Federalist*, pp. 236, 303-305, 408 et seq., 494 et seq. We believe that abrogation of judicial immunity by Congress would destroy the independence of the judiciary in the various States, and consequently deprive them of a republican form of government. (pp. 588-589)

If the Third Civil Rights Act of 1871 were "construed to abrogate judicial immunity," the court continued, "the Act would violate the Guarantee Clause" (p. 589). Because of the framers' intent, because of the Guarantee Clause, because "the concept of judicial immunity [was] deeply rooted in Anglo-American law," and because of previous court decisions embodying the principle of judicial immunity, the Third Circuit Court ruled that judicial officers and their "derivative" cousins, state prosecutors, were entitled to judicial immunity (pp. 587, 590).

The Circuit Court's approach to the issue of justiciability of the Guarantee Clause is interesting for its approach and withdrawal from the issue. Citing the *Luther v. Borden* decision as the beginning of "a long line of cases," the court noted that "[a]lleged violations of this clause have been held to present 'political questions' which are non-justiciable" (p. 589). And then, a surprise:

Despite the wealth of cases holding Art. 4, Sect. 4 violations to be non-justiciable, we think that none would govern the instant case. ... The absence of any overbearing political factor and the presence of substantial precedent to serve as criteria might well require a whole new analysis of the Guarantee Clause and non-justiciability. (p. 589)

And then, having raised the issue of re-analyzing the justiciability of Guarantee Clause claims, the Circuit Court backed away from such work: “Fortunately, our task is only to state the problem, not to resolve it” (p. 589). The court didn’t have to resolve it because they were only spelling out “at least one of perhaps several constitutional questions which would necessarily arise if the Act were construed so as to abrogate judicial immunity” (p. 588).

*Significance for the guarantee clause.*

*Bauers v. Heisel* represents the first time a federal court considered the issue of justiciability of the Guarantee Clause from the perspective of issues that are not political, such an assessment arising after an examination of the facts in the case. The court raised the possibility that *Luther v. Borden* might not be controlling in all situations that involve Guarantee Clause claims.

***Cintron-Garcia v. Romero-Barcelo, 671 F.2d 1 (1982).***

*Case summary.*

The case arose in Puerto Rico where an elected candidate to the Commonwealth’s House of Representatives was discovered to be too young to hold office as determined by Puerto Rico’s constitution. Constitutional procedures for filling legislative vacancies specified that the President of the House should appoint a successor recommended by the political party belonging to the elected representative causing the vacancy.

Eight registered voters filed suit in U.S. District Court for the District of Puerto Rico requesting an injunction to prohibit filling the legislative vacancy by appointment and seeking a court order to compel an election open to all voters. The plaintiffs argued that the Commonwealth’s constitutional provisions governing the replacement procedure violated the

First, Fifth, and Fourteenth Amendments to the U.S. Constitution by not providing “for a by-election open to all voters regardless of party.

The federal district judge issued a preliminary injunction that prevented Commonwealth officials from filling the vacancy through the procedures established by the Constitution of the Commonwealth of Puerto Rico because of a belief that the replacement procedures “probably violated the federal constitution” (p. 1). The First Circuit Court of Appeals granted defendants an appeal.

The federal appeals court held that the Guarantee Clause and the Tenth Amendment jointly work to permit states and Puerto Rico “to decide whether, and when, to fill interim vacancies” in their legislatures (p. 5). According to the three-judge panel of the First Circuit Court of Appeals:

That the federal Constitution embodies this wisdom is suggested by the broad language used in relation to the form of a state’s government (“the United States shall guarantee to every State ... a Republican Form of Government,” Article IV, Section 4); by the Tenth Amendment’s reservation to the states of powers not prohibited by the Constitution, and by the *absence* in the Constitution of any language requiring the contrary.... Thus, considerations of ... federalism (state autonomy in determining, within fairly broad limits, the nature of its own political system) all make it likely that these decisions allowing interim appointments to fill state legislative vacancies remain good law. (p. 5)

The court explained its reasoning in linking Puerto Rico’s republican governmental status with that of the states in the Union:

In sum, this vacancy-filling system appears to be no less fair or democratic than that found in most states; it is nonetheless tailored to the special concerns and political circumstances of the Commonwealth of Puerto Rico. Certainly, the federal Constitution and the Compact entered into by the Congress with Puerto Rico provide no less autonomy to Puerto Rico than to the states in this regard. (p. 7)



The federal appeals court vacated the injunction and remanded the case to the original district court “for proceedings consistent with this opinion” (p. 9).

*Significance for the guarantee clause.*

The significance of this decision rests upon three pillars. First, the decision continues the precedent of not permitting federal intervention in order to foster republican governments at the state level as required by the Guarantee Clause. Second, this is the first case examined since *Luther v. Borden* in which the court relied upon its own application of the Guarantee Clause to the facts and issues of the case without invoking previous Court rulings. Not a single case investigated thus far was cited by the First Circuit Court of Appeals in its decision. Third, this ruling marks the first time that a court opinion linked the Guarantee Clause and the Tenth Amendment and cited them as working together to prevent federal intervention into matters of state government. Both had been linked previously by attorneys’ arguments, but not by any court ruling.

***Brown v. Environmental Protection Agency, 521 F.2d 827 (1975); EPA v. Brown, 431 U.S. 99 (1977).***

*Facts & procedural history.*

Congressional passage of the Clean Air Act Amendments of 1970 gave rise to a series of events that culminated in a hearing before the U.S. Supreme Court. The legal actions surrounding the issues of the case present a somewhat complicated array to organize and simplify. Arguments involved the Guarantee Clause, the Tenth Amendment, and the Commerce Clause that the court discussed along with another issue not raised, the Eleventh Amendment. Two other legal actions preceded the case in question. Federal arguments shifted from the initial hearing to the Supreme Court review. The Supreme Court announced in its decision that it would “not review judgments of the Courts of Appeals invalidating ... regulations promulgated

by” the EPA Administrator, thus requiring a focus on the Appeals Court ruling as well as the Supreme Court opinion (431 U.S. 99). Finally, the case actually heard by the Supreme Court involved four other parallel appeals being consolidated, along with *Brown v. Environmental Protection Agency*, into one with a new title, *EPA v. Brown*.

The original case involved a disagreement between the State of California and the federal government’s Administrator of the Environmental Protection Agency. The disagreement centered on the administration of the Clean Air Act Amendments of 1970. Under this act, states were required to develop and submit plans to the EPA Administrator, William Ruckelshaus, for approval. The state plans needed to provide “for the implementation, maintenance, and enforcement of national ambient air quality standards” (p. 829). EPA-State of California interactions following passage of the Clean Air Act Amendments included partial approval of plans, partial disapproval of plans, no submission of a required plan, and notice of violation from the EPA to California.

Then followed an action that precipitated Governor Brown’s request to the Ninth Circuit Court of Appeals, on behalf of the State of California, for a court review of EPA regulations promulgated by William Ruckelshaus as EPA Administrator. The catalyst for the requested court review centered on the EPA’s promulgation of a transportation plan for California that contemplated reducing the amount of gasoline sold in highly-populated areas, state inspection of vehicles to ascertain the presence of emission-control devices, surcharges on parking spaces, and requiring California to shift funds from “one portion of its budget to another in order to finance the undertakings required by the Agency” (p. 831).

Lawsuits were also filed between the passage of the Clean Air Amendments Act and the court review request submitted by the State of California. First, in *City of Riverside v.*

*Ruckelshaus*, 4 E.R.C. 1728 (C.D.Cal. 1972) the District Court for the Central District of California ordered the EPA Administrator “to promulgate regulations to control photo-chemical oxidants” (p. 829). Then, another court action followed Ruckelshaus’ action in extending the “time within which the national primary standard for photo-chemical oxidants in California could be attained” (p. 829). In *National Resources Defense Council, Inc. v. Environmental Protection Agency*, 154 U.S.App.D.C. 384, 475 F.2d 968 (1973) the court ruled that such an extension was “impermissible under the terms of the Clean Air Act” (p. 829). States had been required to submit implementation plans that would enable them “to meet the primary standard by May 31, 1975” (p. 829). The court ordered Ruckelshaus to “inform the states which had not submitted” the implementation plan that they had until April 15, 1973 to submit such a plan to the EPA (P. 829).

Following the state-requested court review, the federal government appealed for a writ of certiorari to the U.S. Supreme Court. California was not an isolated example of the battle between the federal government and the states over implementation and enforcement of the requirements of the Clean Air Act. In reviewing the appeal of the Ninth Circuit Court’s ruling, the Supreme Court consolidated appeals of rulings by the Court of Appeals for the Fourth Circuit, the District of Columbia Circuit, and another ruling by the Ninth Circuit in a separate case. The Supreme Court noted the similarity between the various circuit court rulings:

All of the courts rested on statutory interpretation, but noted also that serious constitutional questions might be raised if the statute were read as the United States argued it should be. *Brown v. EPA*, 521 F.2d 827 (CA9 1975); *Arizona v. EPA*, 521 F.2D 825 (CA9 1975); *District of Columbia v. Train*, 172 U.S. App.D.C. 311, 521 F.2D 971 (1975); *Maryland v. EPA*, 530 F.2D 215 (CA4 1975). (431 U.S. 99, 102)

*Legal question.*

Does the Administrator of the Environmental protection Agency have the “power to impose sanctions on the state or its officials for their failure to comply with the Administrator’s regulations directing the state to regulate the pollution-creating activities of those other than itself and its subdivisions” (p. 827)?

*Legal reasoning of opposing parties.*

The Commerce Clause constituted the major underpinning of the federal government’s argument. Of course, California took a position different from the federal government with respect to the Commerce Clause and federalism. In its presentation to the three-judge panel, attorneys for California countered the federal government’s pleadings and argued that the Guarantee Clause and the Tenth Amendment work conjunctively to limit undue applications of the Commerce Clause.

[T]he Commerce Power does not extend to requiring a state to undertake such *governmental* tasks as might be assigned to it by Congress, or its proper delegate, with respect to activities which admittedly are within reach of the Commerce Power. The Constitution’s Tenth Amendment and Article IV, Section 4, which obligates the United States to guarantee to every state a Republican Form of government, precludes such an extension of the Commerce Power.... Moreover, insofar as the Necessary and Proper Clause is concerned the petitioners contend that the means, compulsory state administration and enforcement, is inappropriate and inconsistent with the letter and spirit of the Constitution. (p. 838)

The Justice Department attorney argued that the powers of the Clean Air Act to elicit obedience and enforcement on the part of the states derived from Chief Justice John Marshall’s definition of Congress’ power to regulate commerce as spelled out in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). More specifically, “The emission of air pollutants without regard to their source ... has been found by Congress to exert the requisite effect on interstate commerce” which in turn rested on a “rational basis” (p. 837). The federal government next established a

nexus between the Commerce Clause and the Necessary and Proper Clause as spelled out in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 by quoting the following from that decision:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional. (p. 837)

The federal government next drew a specific connecting line from Chief Justice Marshall's exposition of the Necessary and Proper Clause to the Clean Air Act.

The end (abatement of air pollution) is legitimate; it (the power to regulate air emissions) is within the scope of the Constitution; and the means (state administration and enforcement) are appropriate, plainly adapted to the end, which is not prohibited, and consistent with the letter and spirit of the Constitution. (p. 837)

The federal government summarized its legal position in this manner:

Having the power to regulate air pollution, ... Congress, under the Necessary and Proper Clause, has the power to direct that state officials either incorporate in the law of their state or administer and enforce on behalf of the Federal Government those regulations designed to control air pollution which are properly promulgated by the Administrator. (p. 837)

However, circumstances changed by the time the consolidated appeals were heard by the Supreme Court, and the federal government chose to withdraw its legal position that was just previously summarized. In effect, the EPA backed down. In oral argument before the Court, federal attorneys stated the changed position of the EPA which the Court included in its ruling: "The Administrator ... concedes the necessity of removing from the regulations all requirements that the States submit legally adopted regulations; the [Administrator's] regulations contain no requirement that the State adopt laws" (431 U.S. 99, 103). The federal government's concession to the position of the states left the Court with no legal issue upon which to rule.

*Holding & disposition*

The Ninth Circuit Court of Appeals held that the EPA Administrator had no authority to impose sanctions on the state. The court ruled, “All efforts by the Administrator to impose sanctions on the State of California are stayed to the extent indicated in this opinion” (p. 842).

The U.S. Supreme Court vacated the “judgments of the respective Courts of Appeals” and remanded the cases “for consideration of mootness” (431 U.S. 99, 104).

*Court’s rationale*

The Ninth Circuit Court of Appeals, in referring to the state’s legal argument, remarked, “We do not view these contentions as frivolous” (p. 838). As the three-judge panel further noted,

To treat the governance of commerce by the states as within the plenary reach of the Commerce Power would in our opinion represent such an abrupt departure from previous constitutional practice as to make us reluctant to adopt an interpretation of the Clean Air Act which would force us to confront the issue. Such treatment, for example, would authorize Congress to direct the states to regulate any economic activity that affects interstate commerce in any manner Congress sees fit.... A commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress. (p. 839)

The Circuit Court further noted that it did not look with favor upon the federal government’s legal argument, pointing out that a healthy federalism needed to be the major point of concern.

We hasten to point out that our reluctance to accept the Administrator’s interpretation of the Act is not an effort at this late date to ignore Chief Justice Marshall’s triumph over Mr. Jefferson with regard to the power of the Federal government *vis-à-vis* the states. Our concern, as we believe was Justice Marshall’s, is to preserve and protect a strong government of the United States and viable governments of the states. As we see it, our interpretation of the Act is more compatible with these objectives than that of the Administrator. (p. 840)

Regarding the Guarantee Clause, Circuit Judge Sneed, delivering the opinion of the three-judge panel, stated that the facts of the case suggested that the State of California was not “irresponsible when they strongly suggest[ed] that the Republican Form of Government of the

states would be seriously impaired” if the federal government’s interpretation prevailed (p. 840).

Continuing, Circuit Judge Sneed observed:

A structure in which all power on the part of states to spend was vested in Congress while the power and obligation to tax remained with the states would encourage few even casually acquainted with the writings of Montesquieu and the *Federalist* papers to assert that the states enjoyed a Republican Form of Government. (p. 840)

The Ninth Circuit Court of Appeals also drew support from a previous Supreme Court ruling as it noted below:

Finally, we are encouraged by the Supreme Court’s footnote 7 in *Fry v. United States*. In describing the Tenth Amendment, it was said in the footnote: “The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.” 421 U.S. at 547 n.7, 95 S.Ct. at 1795. (p. 842)

The appeals court also drew sustenance from another Supreme Court ruling in *Maryland v.*

*Wirtz*: “The Court has ample power to prevent what the appellants purport to fear, ‘the utter destruction of the State as a sovereign political entity.’ 392 U.S. at 196, 88 S.Ct. at 2024” (p. 842).

Faced with Constitutional issues and statutory interpretation, the Ninth Circuit Court noted its duty.

It is our task, where possible, to avoid a statutory interpretation which would require us to decide whether the extensive control of state expenditures, which the Administrator’s view would permit, does either threaten “the utter destruction of the State as a sovereign political entity,” or “impair the States’ integrity or their ability to function effectively in a federal system.” (p. 842)

The appeals court did find a way to avoid directly confronting the constitutional issues.

Choosing to focus on interpreting the law itself, the Circuit Court noted:

While we do not feel it necessary to embrace fully California’s position, we do believe that the meaning of the Clean Air Act, insofar as the imposition(s) of sanctions is concerned, is sufficiently ambiguous to permit

us to interpret it in a fashion that avoids the constitutional issues. Accordingly we hold that the Clean Air Act does not authorize the imposition of sanctions on a state or its officials for failure to comply with the Administrator's regulations ... (p. 831)

The appeals court ruling differentiated between state actions that violate the Clean Air Act and state actions to enforce a federal law. "Tersely put, the Act, as we see it, permits sanctions against a state that pollutes the air, but not against a state that chooses not to govern polluters as the Administrator directs" (p. 832). According to the written opinion, the circuit judges could not locate in the Clean Air Act any "Congressional intent to make the states departments of the Environmental Protection Agency no less obligated to obey its Administrator's command than are its subordinate officials" (p. 835).

Prior to concluding its opinion, the Ninth Circuit Court of Appeals addressed possible problems with the Eleventh Amendment caused by federal directions to states to enforce federal programs. The Circuit Court specifically quoted a long section of law professor Henry Hart's article, "The Relations Between State and Federal Law," published in the Columbia Law Review in 1954 (54 Colum.L.R. 515-516):

Judicial mandates to non-judicial state officers to enforce either primary or remedial duties requiring the performance of affirmative acts are relatively infrequent. Lower feeder courts may *prohibit* state officers, in their individual capacity, from taking action under color of office in violation of law. But an action to compel the performance of an affirmative act would encounter, ordinarily, the bar of the Eleventh Amendment. Whether a writ of mandamus to compel performance of a ministerial duty would be regarded as an action against the state is not altogether clear. But it is significant that a practice of issuing such writs to state officers has never become established. (pp. 841-842)

As stated previously, the federal government changed its position between the Ninth Circuit Court's ruling and the hearing of the appeal by the U.S. Supreme Court. The Court took note of this change by observing, "But the federal parties have not merely renounced an intent to



pursue certain specified regulations; they now appear to admit that those remaining in controversy are invalid unless modified in certain respects” (431 U.S. at 103). Before vacating the various appeals courts’ judgments by an 8-1 majority, the Court noted:

We decline the federal parties’ invitation to pass upon the EPA regulations, when the only ones before us are admitted to be in need of certain essential modifications. Such action on our part would amount to the rendering of an advisory opinion. For this Court to review regulations normally required to be first reviewed in the Court of Appeals, before such review is had, is extraordinary. (431 U.S. at 103-104)

*Concurring/dissenting opinions*

Justice Stevens dissented, noting that the EPA had not actually rescinded the disputed regulations. According to the Justice,

Unless and until the Environmental Protection Agency rescinds the regulations in dispute, it is perfectly clear that the litigation is not moot. Moreover, an apparent admission that those regulations are invalid unless modified is not a proper reason for vacating the Court of Appeals judgments which invalidated the regulations. (431 U.S. at 104)

Instead, Stevens continued, if the justices were convinced that the EPA Administrator would modify the regulations, “[T]he writs of certiorari should be dismissed as improvidently granted” (431 U.S. at 104). Justice Stevens concluded his dissent with a declaration: “By vacating the judgments below, the Court hands the federal parties a partial victory as a reward for an apparent concession that their position is not supported by statute. I respectfully dissent” (431 U.S. at 104).

***Heimbach v. Chu, 774 F.2d 11 (1984).***

*Case summary.*

The case arose in New York over a financing bill for the Metropolitan Transportation Authority that was passed by the New York Senate in 1981. The finance measure levied an additional tax on the ridership of the Metropolitan Transportation Authority. The state senate

had a procedure for a “fast roll call” voting procedure under which five designated senators could pass a measure unless five senators requested a roll call of the whole senate. Absence during either voting procedure was interpreted under the rules of the senate as indicating a vote in favor of the measure under consideration. Senator Nolan, who opposed the bill, was absent when the vote took place in order to have surgery. The bill received the minimum number of votes required for passage (31), which included a favorable vote by Senator Nolan in his absence.

Louis Heimbach filed a class-action suit in New York Supreme Court, Orange County, on behalf of himself and other voters in Orange and Suffolk counties (Senator Nolan’s senate district) against Roderick Chu, the Commissioner of the New York State Department of Taxation and Finance, and Warren Anderson, Temporary President of the New York State Senate. The suit alleged that the tax act “violated the equal protection rights of taxpayers in Orange and Suffolk counties” (p. 13). The suit claimed that the act “had not been duly enacted because Senator Nolan opposed the bill and his vote should not have been counted in favor of it” (p. 13). The state court for Orange County declared the statute invalid “because it had not received the ‘assent of a majority of the members elected to each branch of the legislature’ as required by ... the New York State Constitution” (p. 13). The court did not rule on the equal protection argument as that issue was rendered moot by the decision to nullify the law.

On appeal the Appellate Division, Second Department of the New York state court system, reversed the decision. Because Heimbach “conceded in that court that the fast roll call procedure did not violate the State constitution,” the court only considered the question of whether the Senate Minority Leader “had wrongfully neglected to have Senator Nolan marked ‘excused’ which would have negated an affirmative vote assumption (p. 13). Refusing to

“intervene in the internal affairs of the Legislature,” the Appellate court reversed the lower court’s decision that had nullified the tax law. Upon further appeal the Court of Appeals took the same approach as the Appellate court, thus upholding the reversal of the original action nullifying the legislation.

Defeated in the state courts, Heimbach filed suit in U.S. District Court for the Southern District of New York seeking a federal ruling that the roll-call procedure and the Senate custom in New York of presuming “affirmative votes by all ‘present’ Senators” violated the “Guarantee Clause of the United States Constitution” (p. 13). Heimbach also “asked the district court to invalidate” the tax on Metropolitan Transportation Authority ridership because the “manner in which it was passed violated the equal protection and due process clauses of the Constitution” (p. 13). The federal district court dismissed the “equal protection and due process claims as improper attempts to challenge a State tax in the federal courts” (p. 13). The district court also dismissed Heimbach’s Guarantee Clause argument because of nonjusticiability and because “appellant’s injury was too abstract to create the standing necessary for bringing suit” (p. 13).

Heimbach was granted an appeal by the U.S. Court of Appeals for the Second Circuit. Noting a newly issued Supreme Court ruling (*Migra v. Warren City School District Board of Education*) in which the Court held “that a State court judgment in a ... civil rights action had the same preclusive effect in federal court that it would have had in the State courts,” the Circuit Court affirmed the federal district court’s ruling regarding the constitutional issues “on the basis of *res judicata*” which bars filing action in another court jurisdiction when further action is barred in another jurisdiction under the same set of facts (p. 13). In other words, because Heimbach was unsuccessful in state court he was precluded from bringing a similar action in federal court. According to the Circuit Judge, “The doctrine of *res judicata* precludes piece-meal

attacks such as are being attempted here” (p. 16). Also, since Heimbach didn’t raise the Constitutional issue of the role call vote as a violation of the Fourteenth Amendment or of the Guarantee Clause in the New York Court of Appeals, it couldn’t be considered later. Also, Heimbach was not barred from raising a Constitutional issue in a state court. According to the opinion delivered by the Circuit Judge, “New York judges ... are bound by oath or affirmation to support the Constitution of the United States, ... and State courts are under the same duty as federal courts to respect rights arising thereunder” (p. 14).

While the Circuit Court upheld the district court’s decision, it did so for a different reason. The Circuit Court also criticized the New York Court of Appeals refusal to “intrude into the wholly internal affairs of the Legislature” even though that aspect of the decision had not been appealed (p. 14). Circuit Judge Van Graafeiland noted that “[l]egislative proceedings which violate the United States Constitution are not ‘wholly internal’ legislative affairs” (p. 15). The Circuit Judge further noted that reliance upon the presiding officer’s certification of a bill’s passage as conclusive was “misplaced” (p. 14). Such a certification “is conclusive evidence only as to the matters certified by the presiding officer. He certifies that the bill ‘so passed’. He does not certify that the method of passage met the requirements of the United States Constitution” (pp. 14-15).

The U.S. Supreme Court, in Order No. 84-944 denied certiorari to Heimbach’s appeal. 470 U.S. 1084 (1985).

*Significance for the guarantee clause.*

Although not specifically noted by the Circuit Court as working to uphold the Guarantee Clause by forbidding federal interference in state affairs, its upholding of the District Court’s

dismissal of appellant's constitutional claims because it interfered in state tax matters amounted to such. According to the Circuit Court,

The Tax Injunction Act, with 'its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations, limit[s] drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes. (p. 15)

Also, in the Circuit Court's admonition that "[l]egislative proceedings which violate the United States Constitution are not 'wholly internal' legislative affairs" brings a portion of Justice Harlan's dissent in *Taylor & Marshall v. Beckham* to judicial life in a majority federal court decision (p. 14). It also raises the issue of potential justiciability of the Guarantee Clause in the future. However, the U.S. District Court had continued the established precedent of ruling that Guarantee Clause claims are not justiciable.

***New York v. United States, 505 U.S. 144 (1992).***

*Case summary.*

In 1985 Congress passed the Low-Level Radioactive Waste Policy Amendments Act that imposed the obligation upon each state to arrange for the disposal of low-level radioactive waste that was generated within its borders. In addition, Congress provided three sets of incentives to provide motivation for the states to comply with the obligations set forth in the act. The State of New York and two of its counties filed suit against the United States in federal district court

seeking a declaratory judgment that, *inter alia*, the three incentives provisions are inconsistent with the Tenth Amendment – which declares that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States” – and with the Guarantee Clause of Article IV, § 4 – which directs the United States to “guarantee to every State ... a Republican Form of Government.” (p. 144)

The original suit also contained arguments that the congressional action violated the Eleventh Amendment and the Due Process Clause requirements of the Fifth Amendment.

The U.S. District Court for the Northern District of New York dismissed the suit. Upon appeal the Court of Appeals for the Second Circuit affirmed the district court's dismissal. Subsequently the Supreme Court granted *certiorari*. Since the main arguments and the major portion of the Court's opinion focused upon the Tenth Amendment, this case will be more fully treated in Chapter 6 (see pp. 439-470). The following discussion of the Court's opinion will focus solely upon the Guarantee Clause. Justice O'Connor delivered the Court's opinion.

Having already invalidated one set of incentives because it violated the Tenth Amendment, the Court limited its discussion to the "applicability of the Guarantee Clause to the Act's other two challenged provisions" (p. 184). Noting that the Court was approaching "the issue with some trepidation, because the Guarantee Clause has been an infrequent basis for litigation throughout our history," Justice O'Connor summarized that history by observing that the Court, in the majority of cases, had "found the claims presented to be nonjusticiable under the 'political question' doctrine" (p. 184). In citing those cases, the Court drew a line from the *Pacific States* decision to the decision of *City of Rome* that was decided in 1980. The Court next noted that the nonjusticiability of the Guarantee Clause claims was rooted in *Luther v. Borden*. Justice O'Connor noted that the holding in *Luther* was limited to the issue of deciding "what government is the established one in a State" (p. 184). Yet somehow, she continued, "Over the following century, this limited holding metamorphosed in the sweeping assertion that '[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts.' *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion)" (p. 184). Justice O'Connor then carved out a separate set of Guarantee Clause cases that addressed the arguments put forth instead of dismissing them on the ground of nonjusticiability.

This view [automatic nonjusticiability] has not always been accepted. In a group of cases decided before the holding of *Luther* was elevated into a

general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable. See *Attorney General of Michigan ex rel. Kies v. Lowrey*, 199 U.S. 233, 239 (1905); *Forsyth v. Hammond*, 166 U.S. 506, 519 (1897); *In re Duncan*, 139 U.S. 449, 461-462 (1891); *Minor v. Happersett*, 21 Wall. 162, 175-176 (1875). (pp. 184-185)

It would seem that Justice O'Connor and a majority of the Court viewed *Pacific States* as decisive in making the issue of nonjusticiability of Guarantee Clause a general rule of *stare decisis*.

Justice O'Connor continued by pointing out that the Court itself had "suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. See *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) ("[S]ome questions raised under the Guarantee Clause are nonjusticiable")" (p. 185). The Court then noted that contemporary legal scholars had "likewise suggested that courts should address the merits of such claims, at least in some circumstances" (p. 185).

Noting next that the "difficult question" of Guarantee Claim justiciability didn't need to be resolved in the current decision of the Court, Justice O'Connor proceeded under the hypothetical assumption that it was justiciable and examined its applicability to the facts of the case.

[N]either the monetary incentives provided by the Act nor the possibility that a State's waste producers may find themselves excluded from the disposal sites of another State can reasonably be said to deny any State a republican form of government. (p. 185)

The opinion next explained the reasons for such an interpretation.

As we have seen [in the portion focusing upon the Tenth Amendment arguments], these two incentives represent permissible conditional exercises of Congress' authority under the Spending and Commerce Clauses respectively, in forms that have now grown commonplace. Under each, Congress offers the States a legitimate choice rather than issuing an unavoidable command. The States thereby retain the ability to set their

legislative agendas; state government officials remain accountable to the local electorate. The twin threats imposed by the first two challenged provisions of the Act ... do not pose any realistic risk of altering the form or the method of functioning of New York's government. (pp. 185-186)

The Court concluded its discussion of the Guarantee Clause arguments by observing, "Thus even indulging the assumption that the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute, petitioners have not made out such a claim in these cases" (p. 186).

*Significance for the guarantee clause.*

First, this is the second High Court opinion explicitly challenging the generalized application of nonjusticiability to all claims arising under the Guarantee Clause and continues the discussion initiated by Justice Brennan in *Baker v. Carr* (1962). Second, the Court noted additions to Justice Brennan's discussion of justiciability of the Guarantee Clause that had occurred between *Baker v. Carr* and *New York v. United States*. One such continuation included a remark by Chief Justice Earl Warren in *Reynolds v. Sims* (1964) which "suggested," in Justice O'Connor's words, "that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions" (p. 185). Justice O'Connor quoted Chief Justice Warren's actual statement from *Reynolds v. Sims*: "[S]ome [sic] questions raised under the Guarantee Clause are nonjusticiable" (377 U.S. 533, 582; cited p. 185). For the second continuation of Justice Brennan's original discussion about the justiciability of the Guarantee Clause, Justice O'Connor noted and cited the work of legal and historical scholars as well. According to Justice O'Connor:

Contemporary commentators have likewise suggested that courts should address the merits of such claims [presented under the Guarantee Clause], at least in some circumstances. See, e.g., L. Tribe, *American Constitutional Law* 398 (2d ed. 1988); J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 118, n., and 122-123 (1980); W. Wiecek, *The Guarantee*



Clause of the U.S. Constitution 287-289, 300 (1972); Merritt, 88 Colum. L. Rev., at 70-78; Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 Minn. L. Rev. 513, 560-565 (1962). (505 U.S. 144, 185)

Third, this decision would seem to suggest that if claims are to be successful against alleged unconstitutional use by Congress of its perceived authority as granted by the Spending Clause, such claims will need to address the conditional tests posed by the Court in its *Dole* decision.

***A republican government and racial discrimination.***

***Dred Scott v. Sandford, 60 U.S. 393 (1857).***

*Case summary.*

One needs to read the dissenting opinions as well as independent case summaries in order to get a full-blown portrayal of the basic facts of the case because the majority opinion completely ignored the state case law of Missouri and the events transpiring in Missouri state courts prior to the federal action. Also, a clerical error in the federal handling of the case misspelled Sanford. However, the misspelling became part of the official federal court record.

Dred Scott was born in Virginia as a slave. After moving to St. Louis with his master, he was sold in 1833 to an army surgeon, Dr. John Emerson. Emerson's army career took them both to Rock Island, Illinois (a free state) from 1834 to 1836 after which they went to Fort Snelling in the Upper Louisiana Territory (soon afterward the Wisconsin Territory), a territory in which slavery was prohibited by the Missouri Compromise. While in Fort Snelling from 1836 to 1838, Scott married Harriet Robinson whose ownership was transferred to Dr. Emerson. In 1838 Emerson was transferred to western Louisiana where he met and married Irene Sanford whose family lived in St. Louis. When Dr. Emerson was posted to Florida in 1842 to help with the Seminole War, his wife and the family slaves remained in St. Louis. Shortly after rejoining his

family in St. Louis in 1843, Emerson died. Dred and Harriet Scott continued to work for his widow.

In 1846 Dred and Harriet Scott filed action to obtain their freedom in the Missouri Circuit Court of St. Louis County. Numerous precedents in Missouri case law supported such a suit, the general rule of law being that a slave living with his or her master in a free state or territory gained their freedom. “[I]t has been recognized from the beginning of the Government as a correct position in law, that a master who takes his slave to reside in a State or Territory where slavery is prohibited, thereby emancipates his slave” (p. 554). Another source described the Missouri case law:

[I]f a slave returned to Missouri, as Dred Scott had done, after having sojourned in a free state or territory, that slave was entitled to freedom by virtue of residence in the free state or territory. The established legal principle in Missouri was “once free, always free.” (Hall, 1999, p. 277)

According to Justice McLean’s dissent, Missouri was not the only slave state with such case law. “It has been so held in Mississippi, in Virginia, in Louisiana, formerly in Kentucky, Maryland, and in other States” (p. 558).

The case came to trial in 1847 where “a problem of hearsay evidence resulted in the judge ordering a mistrial” (Hall, 1999, p. 277). The case was not retried until three years later in 1850 when the court ordered that Dred Scott be freed. An earlier agreement to try only one suit meant that the judgment also applied to his wife, Harriet Scott. However, events occurring in the intervening three years prior to the second trial combined to the Scotts’ disadvantage. Mrs. Emerson remarried and moved with her new husband to New England, leaving her affairs in St. Louis in the hands of her brother, John Sanford. During the same time period, Scott’s wages were held in escrow until his status as free man or slave was determined by the courts. One

commentator noted that “the possible loss of his accumulated wages led Sanford, acting for his sister, to appeal to the Missouri Supreme Court seeking a reversal” (Hall, 1999, p. 277).

The appeal before the Missouri Supreme Court in 1852 came at a time of heightened debate over the slavery issue in the United States and “transformed the litigation from a routine freedom suit to a *cause célèbre*” (Hall, 1999, p. 277). The Supreme Court of Missouri reversed the decision of the lower court. In doing so it ignored its own established rule of law. In his dissent, Justice McLean declared, “Rights sanctioned for twenty-eight years ought not and cannot be repudiated, with any semblance of justice, by one or two decisions, influenced, as declared, by a determination to counteract the excitement against slavery in the free states” (p. 556).

Fearing the case would be dismissed on direct appeal to the U.S. Supreme Court on the basis of the decision of the state supreme court without any consideration of the merits of the case, Scott’s attorneys began a new suit in federal court challenging the Missouri court’s reversal of the “once free, always free” legal principle (Hall, 1999, p. 277). This was done by filing an “action of trespass” against Sanford for assaulting and imprisoning Dred Scott, his wife Harriet, and their two daughters “on the ground that they were his slaves, which was without right on his part, and against law” (p. 529).

Chief Justice Roger Taney delivered the Court’s opinion for the 7-2 majority following the second argument of the case. He began by framing the question before the Court:

Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution. (p. 403)

Shortly thereafter in the opinion, Taney again inquired “whether the class of persons described in the plea” could be considered part of the “people of the United States” in terms of participating in representative government. The Chief Justice answered:

We think they are not, and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. (p. 404)

Taney continued to articulate the majority view:

On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them. (pp. 404-405)

According to the Chief Justice, this view of African-Americans did not originate with the country’s republican framers.

They [people of African heritage] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. (p. 407)

After noting provisions of the Articles of Confederation and the federal Constitution pertaining to slavery and after an extensive review of state and federal legislation displaying racial prejudice, Story delivered the first decision of the opinion.

Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous. (p. 427)

Although neither the plaintiff nor the defendant had questioned the constitutionality of the Missouri Compromise, the Court next turned its attention to it, claiming that this law formed

the basis for Scott's claim that he should be declared a free man. This law also, according to Chief Justice Taney, perhaps provided the foundation for the Circuit Court's erroneous decision granting Dred Scott legal standing to file a suit in federal court.

The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included with in the limits of Missouri. (p. 432)

The Court phrased the new question that it raised:

[T]he inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the States. (p. 432)

Carving out a new interpretation and casting aside all precedents, the Court majority ruled that the term, territory, as used in the Constitution referred only "to a territory then in existence, and then known or claimed as the territory of the United States" (p. 436). Since the Louisiana Territory did not belong to the United States at the time the Constitution was adopted, it was not a territory within the meaning of the Constitution.

Consequently, the power which Congress may have lawfully exercised in this Territory, while it remained under a Territorial Government, and which may have been sanctioned by judicial decision, can furnish no justification and no argument to support a similar exercise of power over territory afterwards acquired by the Federal Government. We put aside, therefore, any argument, drawn from precedents, showing the extent of the power which the General Government exercised over slavery in this Territory, as altogether inapplicable to the case before us. (p. 442)

According to Taney, the federal government is bound "to maintain in the Territory the authority and rights of the Government, and also the personal rights and rights of property of individual citizens, as secured by the Constitution" (p. 447). The Court next applied the rights of due process guaranteed by the Fifth Amendment to slaveholders.

Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process law. (p. 450)

The Court opinion summarized this interpretation, “The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them” (p. 450). Turning next to the supposition that there was a “difference between property in a slave and other property” that obligated the Court to a different set of rules, Taney declared:

[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner.... And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights. (pp. 451-452)

And then the Court majority invalidated the Missouri Compromise which, in turn, eliminated the underpinning of Scott’s claim to freedom:

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident. (p. 452)

The decision in *Scott v. Sandford* “played a major role in precipitating the Civil War (Hall, 1999, p. 277).

American legal and constitutional scholars consider the *Dred Scott* decision to be the worst ever rendered by the Supreme Court. Historians have abundantly documented its role in crystallizing attitudes that led to war. Taney's opinion stands as a model of censurable judicial craft and failed judicial statesmanship. It took the Civil War and the Civil War Amendments to overturn the *Dred Scott* decision. (Hall, 1999, p. 278)

Dred Scott, however, gained no benefit from Lincoln's Civil War Emancipation Proclamation or from the Thirteenth, Fourteenth, and Fifteenth Amendments. He died in 1858.

*Significance for the guarantee clause.*

Freedom from slavery is today considered a basic human right. Humans are not property – period. Such was not the majority view when this case was decided. While at least one dissenting justice opined that slavery had no basis in either moral or political reasoning, but only under express laws enacted by particular societies, no justices argued that it violated any principles of republican government. Today, while no one rationally argues that race provides grounds for categorization as a sub-species, seven majority justices in this case held that it did, that race (being of African descent) precluded individuals from U.S. citizenship. Only two justices didn't subscribe to that belief in this case. However, this counter-belief was not advanced under any principles of republican government. What is significant for the modern reader is the absence of any discussion about the requirements of republican government in terms of basic rights.

***Plessy v. Ferguson, 163 U.S. 537 (1896).***

*Case summary.*

This case began in Louisiana as an effort to test the constitutionality of "Jim Crow" laws segregating the races as southern whites gained control of state legislatures. In 1890 the Louisiana legislature enacted the "Separate Railway Car" legislation that required railroads "to provide equal, but separate, accommodations for the white and colored races" and that further

provided criminal penalties for violations of the statute (p. 537). “A New Orleans group of Creoles and blacks organized themselves as the Citizens’ Committee to Test the Constitutionality of the Separate Car Law” (Hall, 1999, p. 239). The railroads provided some support to the group because of the added costs of providing extra cars to implement the law.

Plessy agreed to challenge the law with the committee’s support. An earlier Louisiana Supreme Court decision had ruled the law could not apply to interstate commerce, so Plessy was careful to purchase a ticket for in-state travel only. Upon boarding the train, he selected a seat in the “coach where passengers of the white race were accommodated” (p. 538). Plessy was arrested, removed from the train, and placed in the parish jail of New Orleans to await trial after refusing to move from the white car to “the coach used for the race to which he belonged” (p. 541). Although Plessy was “seven eighths Caucasian and one-eighth African blood” and although “the mixture of colored blood was not discernible in him,” Plessy was classified as “colored” according to Louisiana law (p. 541; Hall, 1999, p. 239).

John Ferguson was the judge of the criminal District Court for the parish of Orleans who was subsequently named defendant in a suit seeking to enjoin the judge from adjudicating an unconstitutional law. At the criminal trial, Judge Ferguson overruled Plessy’s pleading challenging the constitutionality of the act as being “in conflict with the Constitution of the United States,” particularly the Thirteenth and Fourteenth Amendments (p. 539). Ferguson further declared that unless “enjoined by a writ of prohibition for further proceeding” in the case, he was prepared to “fine and sentence petitioner to imprisonment” (p. 539). Plessy was granted both a writ of prohibition and a writ of certiorari by the Louisiana Supreme Court who subsequently ruled the statute constitutional and denied further relief to Plessy. Plessy was



granted a writ of error to the U.S. Supreme Court with the agreement of the Chief Justice of the Louisiana Supreme Court.

The Court narrowly construed the Thirteenth Amendment to apply literally to only those attempts to reintroduce slavery or involuntary servitude. Speaking of the Thirteenth Amendment, Justice Brown recounted a previous ruling: “This amendment was said in the *Slaughter-house cases*, 16 Wall. 36, to have been intended primarily to abolish slavery” (p. 542). He continued by noting a subsequent ruling by the Court.

So, too, in the *Civil Rights cases*, 109 U.S. 3, 24, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but only as involving an ordinary civil injury, properly cognizable by the laws of the State... (pp. 542-543)

The Court held that the Thirteenth Amendment did not prohibit distinctions based on skin color.

A statute which implies merely a legal distinction between the white and colored races – a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color – has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude. (p. 543)

The Court next turned to the Fourteenth Amendment argument, which it had touched upon in its discussion of the Thirteenth Amendment and the “*Slaughter-house cases*” (p. 542).

It was intimated, however, in that case that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; and that the Fourteenth Amendment was devised to meet this exigency. (p. 542)

Having held out the hope that Plessy’s argument of the Louisiana statute’s unconstitutionality as an infringement of the Fourteenth Amendment, the Court proceeded to demolish that hope in

piecemeal fashion. It first began by distinguishing between rights of U.S. citizens and those pertaining to state citizenship. Speaking of the Fourteenth Amendment, Justice Brown observed:

[B]ut it was said generally that its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States. (p. 543)

Continuing, the Court next distinguished between political and social equality.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. (p. 544)

Continuing to speak for the 7-1 majority, Justice Brown invoked *stare decisis*: “The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court” (p. 545). The Court reduced the argument of the statute’s conflict with the Fourteenth Amendment to a “question whether the statute of Louisiana is a reasonable regulation” with the Court’s interpretative answer providing “a large discretion on the part of the legislature” (p. 550).

In determining the question of reasonableness it [the Louisiana legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures. (pp. 550-551)

The Court next turned its attention to the attitudes and faulty reasoning employed by those who sought to challenge the impending “Separate But Equal” decision that would authorize the continuance and expansion of Jim Crow legislation.

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.... The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling. We cannot accept this proposition.

Immediately prior to affirming the decision of the Louisiana Supreme Court, the Court declared:

“If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane” (p. 552). The doctrine articulated and the policies approved by the Court in *Plessy v. Ferguson* would stand unchallenged in law for the next half-century.

Justice John Marshall Harlan offered a stinging dissent that provided support to later challenges to and rejections of the “separate but equal doctrine” (Hall, 1999, p. 240). In his dissent Justice Harlan offered a different interpretation of the Thirteenth Amendment.

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. (p. 555)

Noting that the Thirteenth Amendment had “been found inadequate to the protection of the rights of those who had been slavery,” Harlan observed that the Fourteenth Amendment was adopted to secure unprotected rights (p. 555). Together, these two amendments forged, in Harlan’s view, what should have been an insurmountable barrier to legalized racial distinctions.

These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and

citizenship.... These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. (p. 555)

Justice Harlan pointed to the intent of racial discrimination behind the efforts to segregate the races.

Every one knows that the statute in question had its origin in the purpose ... to exclude colored people from coaches occupied by or assigned to white persons.... The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. (p. 557)

Describing the racial attitudes of whites, Harlan noted, “The white race deems itself to be the dominant race in this country” (p 559). “But,” he continued, “in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here” (p. 559). In ringing tones that held a beacon light for yet far-distant legal decisions, Justice Harlan declared:

Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. (p. 559)

According to Harlan, “[T]he statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States” (p. 563). If upheld, a system “of sinister legislation” on the part of the states with the purpose of interfering “with the full enjoyment of the blessings of freedom” and of regulating “civil rights, common to all citizens, upon the basis of race” would be legalized (p. 563). In Harlan’s view, such a ruling by the Court would contravene the Guarantee Clause.

Such a system is inconsistent with the guarantee given by the Constitution to each State of a republican form of government, and may be stricken down by Congressional action, or by the courts in the discharge of their solemn

duty to maintain the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. (p. 564)

Before closing his dissent, Justice Harlan compared the majority's decision with the *Dred Scott* decision, declaring, "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case*" (p. 559). Indeed, both the *Scott* and *Plessy* decisions gave life to the taunt thrown centuries before by Thrasymachus to Socrates in Plato's *Republic*, that justice is nothing but the advantage of the stronger (Cornford, pp. 18, 25). His taunt was later paraphrased as "might makes right." A noted historian later commented, "Like acts of intolerance, discourtesy, and inhumanity, acts of segregation acquire a new significance when they are endowed with the compulsory conformity of 'folkways' or the majesty of the law" (Woodward, p. viii). The *Plessy* decision clothed majority "folkways" regarding racial prejudice in the majestic robes of legality posing as "the supreme Law of the Land" (Woodward, p. viii; U.S. Constitution, Article VI).

*Significance for the guarantee clause.*

Justice Harlan's dissent stands as the first Court attempt to characterize racial discrimination as unrepugnant in character and thus represents an attempt to contravene the Guarantee Clause of the United States Constitution. Harlan's dissent also differs from the accepted reasoning that held the Court could not address claims arising under the Guarantee Clause. In Harlan's view, racial discrimination violates the foundations of republican government and thus presents a justiciable claim for the Court to resolve.

***Brown v. Board of Education, 347 U.S. 483 (1954).***

*Case summary.*

*Brown* cannot be properly understood and fully appreciated apart from its context. And its contextual legal foundation was constructed by Charles Hamilton Houston, the architect of the

NAACP strategy that culminated in *Brown*. Appointed to the newly created position of Special Counsel by the NAACP in 1935, Houston accepted

on the condition that the program of litigation be conducted as a protracted legal struggle based on the planned, deliberate prosecution of test cases to secure favorable legal precedents, and thereby lay a foundation for subsequent frontal attacks against racial discrimination and discrimination. (McNeil, p. 134)

Houston favored a “step-by-step process” because he believed it “would have greater long-range effects” by virtue of its recognition of a “lack of tradition for equality within the American system” (McNeil, p. 135). Showing a recognition of what would later be termed a systems approach and of the requirements of adaptive work over time in terms of changing attitudes and beliefs, Houston observed, “The social and public factors must be developed at least along with and, if possible, before the actual litigation commences” (McNeil, p. 135).

To this strategy Houston welded his concept of “the lawyer’s basic duty of social engineering,” a moral position that provided both direction and inspiration to those doing the work (McNeil, p. 84). According to Houston, a social engineer’s responsibility was to be “the mouthpiece of the weak and a sentinel guarding against wrong” (McNeil, p. 85). In Houston’s view, “[D]iscrimination, injustice, and the denial of full citizenship rights and opportunities on the basis of race and a background of slavery could be challenged within the context of the Constitution if it were creatively, innovatively interpreted and used” (McNeil, pp. 84-85). Such social engineering work required “a highly skilled, perceptive, sensitive lawyer who understood the Constitution of the United States and knew how to explore its uses in the solving of ‘problems of ... local communities’ and in ‘bettering conditions of the underprivileged citizens’” (McNeil, p. 84). As the “architect and dominant force of [the] legal program” for the NAACP, Houston also devised the tactical approach to be used by the NAACP (McNeil, p. 133):

The “positionary tactics” devised by Houston – within the context of a basic strategy of judicial precedent-building for the erosion of the “separate but equal” principle and establishment of the unconstitutionality of segregation – constituted the program of the NAACP for the legal struggle against educational discrimination... He selected:

three glaring and typical discriminations as focal points for legal action: (1) differentials in teachers’ pay between white and Negro teachers having the same qualifications, holding the same certificate, and doing the same work; (2) inequalities in transportation...; (3) inequalities in graduate and professional education... (CHH, “Tentative Statement Concerning Policy of N.A.A.C.P.”, p. 1.).

(McNeil, p. 136)

In delivering the Court’s opinion in *Brown*, Chief Justice Warren traced the various decisions since 1935 whereby the system of Jim Crow had been successfully challenged with regards to higher education. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1937), a case argued by Houston, ended Missouri’s practice of sending African-American students out of state for law school by paying their tuition while the opinion in *Sipuel v. Oklahoma*, 332 U.S. 631 (1948), another case argued by Houston, directed Oklahoma to provide Ada Sipuel a legal education in Oklahoma instead of sending her out of state (See Appendix O, pp. 1155-1157 of this paper for further discussion of *Missouri ex rel. Gaines v. Canada*). *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950), ordered an end to “separate but equal” practices in higher education because such practices denied McLaurin “his personal and present rights to the equal protection of the laws” as required under the Fourteenth Amendment (339 U.S. 637, 642). In *Sweatt v. Painter*, 339 U.S. 629 (1950), the Court “made clear that the separate but equal standard established by *Plessy v. Ferguson* (1896) was unattainable – at least in state-supported higher education” (Hall, 1999, p. 298).<sup>26</sup> The *Sweatt* holding declared “that a segregated law school for Negroes could not provide them equal educational opportunities” and ordered that Sweatt be admitted to the previously all-white University of Texas Law School (p.

493). Described as a “landmark decision in the history of United States race relations” by a legal scholar, *Sweat* had been argued by a future justice of the Supreme Court, Thurgood Marshall (Hall, 1992, 851).

*Brown* actually consisted of two separate rulings, the first on the merits and the second on the relief. They are sometimes referred to as *Brown I*, 347 U.S. 483 (1954) and *Brown II*, 349 U.S. 294 (1955). The two decisions resulted from Chief Justice Warren’s proposal to the Court justices to separate the two decisions in order to reduce the monumental questions involved to manageable scope (Hall, 1999, pp. 34-35). *Brown I* also consisted of an original argument on December 9, 1952 followed by a re-argument on December 8, 1953. *Brown II* resulted after hearing re-argument regarding the questions of who should be responsible for ensuring that the relief is provided and at what pace it should occur. *Brown I* held that separate but equal had no place in public education while *Brown II* ordered that school desegregation should proceed with “all deliberate speed” (349 U.S. 294, ).

The first *Brown* decision represented a ruling on not just one case, but on three others as well. According to the Chief Justice, the four cases presented “a common legal question” that justified their being considered “together in this consolidated opinion” (p. 486). The common legal question arose from the similar efforts of school children in Kansas, South Carolina, Virginia, and Delaware to “seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis” (p. 487).

In the case bearing the name of the consolidated opinion, elementary children in Topeka filed action in the U.S. District Court for the District of Kansas “to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students” (p. 486, n. 1). The District



Court, consisting of a three-judge panel, ruled that “segregation in public education has a detrimental effect upon Negro children,” but it “denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers” (p. 486, n. 1). The U.S. Supreme Court granted the request for appeal.

Plaintiffs in the South Carolina case, *Briggs v. Elliott*, were elementary and high school students in Clarendon County. They filed suit in the U.S. District Court for the Eastern District of South Carolina seeking an injunction to stop enforcement of sections in the state’s constitution and statutes that required “the segregation of Negroes and whites in public schools” (p. 486, n. 1). “The three-judge District Court” denied the relief requested by the plaintiffs, but “found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities” (p. 486, n. 1). The District Court “ordered the defendants to begin immediately to equalize the facilities,” but denied admission to the white schools for the plaintiffs during the process of the equalization program (p. 486, n. 1). The U.S. Supreme Court vacated the decision and remanded for hearing on the progress of the equalization program. Following that hearing which found progress in the states equalization program, the Supreme Court granted plaintiff’s request for appeal.

Plaintiffs in the Virginia case were high school students in Prince Edward County. Filing suit in U.S. District Court for the Eastern District of Virginia, they sought an injunction to stop enforcement of the state constitutional and statutory code provisions requiring “the segregation of Negroes and whites in public schools” (p. 487, n. 1). In *Davis v. County School Board*, a three-judge panel denied the injunction, but “found the Negro school inferior in physical plant, curricula, and transportation” (p. 487, n. 1). Similar to the South Carolina case, the District

Court ordered the defendants to provide the plaintiffs an equal program while denying them admission to white schools while the equalization program was being undertaken. The U.S. Supreme Court granted the plaintiffs' request for appeal.

The ruling in the Delaware case, *Gebhart v. Belton*, contained an interesting statement that "segregation itself results in an inferior education for Negro children" (p. 488, n. 1). The case was filed in the Delaware Court of Chancery on behalf of elementary and high school students living in New Castle County. Like the suits in South Carolina and Virginia, plaintiffs sought an injunction stop the constitutional and statutory requirements that required segregation in the state's public schools. Unlike the federal courts in Virginia and South Carolina, however, the "Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children" because of the enumerated conditions of inferiority in the Negro schools (p. 487, n. 1). Upon appeal the Supreme Court of Delaware affirmed the Chancellor's ruling, but suggested that "the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished" (p. 488, n. 1). The defendants appealed only the "immediate admission of the Negro plaintiffs to the white schools" to the U.S. Supreme Court who agreed to review the case.

In its unanimous 9-0 ruling the Supreme Court noted that in "each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called 'separate but equal' doctrine announced by this Court in *Plessy v. Ferguson*, 163 U.S. 537" (p. 488). The Court also noted plaintiffs' contention, "that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws" (p. 488). Turning to the subject of education, the Court declared, "Today, education is perhaps the most important function of state and local governments" (p. 493). Continuing, the

Court reasoned, “In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms”

(p. 493). Coming to the heart of the matter, the Court noted:

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. (p. 493)

The Court explained its reasoning in terms of the psychological damage caused by segregation.

To separate them from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs... (p. 494)

Commenting that the “extent of psychological knowledge at the time of *Plessy v. Ferguson*” was unknown, the Court stated that the findings of psychological damage were “amply supported by modern authority” and declared, “Any language in *Plessy v. Ferguson* contrary to this finding is rejected” (pp. 494-495). Continuing, the Court announced its conclusion:

We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. (p. 495)

Before closing, Chief Justice Warren repeated, “We have now announced that such segregation is a denial of the equal protection of the laws” (p. 495).

On a somewhat poignant note, although his strategy proved successful in toppling *Plessy*'s separate but equal doctrine as a legal bulwark of segregation, Charles Hamilton Houston didn't live to see it. He died April 22, 1950 of a heart attack (McNeil, p. 250). However, his pupil and mentee, Thurgood Marshall led the arguments for the plaintiffs before the Court. Years later, after being named to the Supreme Court, Justice Marshall recounted Houston's contributions to *Brown*:

When *Brown* against the Board of Education was being argued in the Supreme Court ... [t]here were some two dozen lawyers on the side of the Negroes fighting for their schools.... [O]f those ... lawyers ... only two hadn't been touched by Charlie Houston.... [T]hat man was the engineer of all of it. (McNeil, p. 3)

*Significance for the guarantee clause.*

Rights to equal protection of the laws and to due process as protected by the Fourteenth Amendment embody particularized requirements of a republican government. The Guarantee Clause was cited by Congressional leaders as the primary justification for the Fourteenth Amendment. While the *Brown* decision didn't mention the Guarantee Clause, it's holding centered on the concept of inviolable rights as part of the nation's definition of republican government, its duties, and its purposes.

### **Summary of Salient Points**

This chapter began by introducing the Guarantee Clause and reviewing its historical background. Understandings of the Guarantee Clause as determining boundaries of federalism between state and federal governmental responsibilities were presented through an examination of comments and statements made at the Constitutional Convention, uttered during the debates in ratifying conventions in the various states, set forth in the *Federalist*, and presented by the Anti-Federalists. Montesquieu's influence on the necessity for such a clause protecting and ensuring

republican governments was discussed as were subsequent uses of the Guarantee Clause by the executive and legislative branches of American government.

More substantially, an examination of specific court cases formed the basis for an investigation of the case law emerging from legal disputes involving concepts embodied in the Guarantee Clause. Cases culminating in U.S. Supreme Court decisions constituted the majority. The 39 cases, selected through an extensive literature review, represent all of the cases that this writer was able to identify in which the Guarantee Clause was either presented as a legal argument by one of the litigants or was discussed in the opinion. The analysis of each case utilized one of the two formats presented in Chapter 1. Cases were grouped thematically into five general categories:

- Guarantee Clause requires federal intervention to restore republican government to a state.
- Guarantee Clause requires federal intervention to secure protection against abusive state government.
- Guarantee Clause requires that legislation be overturned because of its unrepublican nature.
- Guarantee Clause prohibits federal intervention so that the state continues to have a republican government.
- Republican government and race.

The first case in which the Supreme Court interpreted the Guarantee Clause arose out of the Dorr Rebellion in Rhode Island. In *Luther v. Borden* (1849), the Supreme Court ruled that the issues presented (centering on the question of which government was the legitimate one) were political questions most properly handled by the “political power and not ... the judicial,”

that the State of Rhode Island had “already decided” the political questions, that the President (under the authority of an act of Congress) had likewise recognized the charter government as being the lawful government of Rhode Island, and that the “courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State” (48 U.S. 1, 39, 40). Out of this grew the doctrine that Guarantee Clause questions constituted political questions and were therefore nonjusticiable.

Several thematic threads run through the Guarantee Clause jurisprudence. The first thread centers on the idea that the Courts should invalidate legislation deemed to be violative of the principles of republican government. Cases illustrating this thematic thread include *Rice v. Foster* (1847), *Pacific States Telephone & Telegraph v. Oregon* (1912), *Kiernan v. Portland* (1912), *Denver v. New York Trust Co.* (1913), and *Ohio ex rel. Davis v. Hildebrandt* (1916). The second thematic thread focuses on the idea that a republican government is a government that won’t tolerate discrimination based on either gender or race. Cases involved in this thematic strand include *Minor v. Happersett* (1875), *United States v. Cruikshank* (1876), and *Plessy v. Ferguson* (1896). The third thematic thread centers on narrowing the holding of *Luther v. Borden* so that it doesn’t act to automatically exclude all cases brought under the Guarantee Clause. Justice Brennan’s majority opinion in *Baker v. Carr* (1962), the first of the reapportionment cases, and Justice O’Connor’s majority opinion in *New York v. United States* (1992), a case wherein Guarantee Clause and Tenth Amendment arguments intertwined, occupy center stage in portraying the third thematic thread of Guarantee Clause jurisprudence. Chief Justice Warren’s solitary remark in *Reynolds v. Sims* (1964), the last of the reapportionment cases, plays a supporting role as well.

Regarding the first thematic thread centering on the idea that the preservation of a republican form of government requires that legislation be invalidated by the courts, only one court in our nation's history did just that. In 1847, two years before *Luther v. Borden* was decided, the Supreme Court of Delaware overturned state legislation whereby the residents of each county would determine whether or not liquor would be sold in their county. The decision was based upon the state constitution and the ideas of republican government contained in that document. In *Rice v. Foster* (1847), attorneys for Rice had argued that the state legislature delegated "legislative power to a majority of the people in a county," an act that was contrary to a representative republican form of government (4 Del. 479, 481). According to Rice's attorneys:

The people cannot make a law; neither the whole people nor a part of them. All laws must be made by their representatives in general assembly met for deliberation, consultation and judgment; acting under oath, and under the restrictions of the constitution. (4 Del. 479, 481)

In announcing the holding that invalidated the Delaware legislature's act, the Chief Justice of the Delaware Supreme Court noted that the "legislature [had] declined the responsibility which it was their duty to assume" (4 Del. 479, 490). The holding was based on the following finding whereby the Supreme Court of Delaware declared:

The sovereign power therefore, of this State, resides with the legislative, executive, and judicial departments. Having thus transferred the sovereign power, the people cannot resume of exercise any portion of it. To do so, would be an infraction of the constitution and a dissolution of the government. (4 Del. 479, 488)

Announcing the Delaware Supreme Court's holding, Chief Justice James Booth pronounced:

The only check which the constitution [of the State of Delaware] interposes to an act of the legislature tending to such consequences, is an independent and upright judiciary. As the act ... is repugnant to the principles, spirit, and true intent and meaning of the constitution of this State, and tends to subvert

our representative republican form of government, it is the unanimous opinion of this Court, that the said act is null and void... (4 Del. 479, 499)

As was noted earlier in this document, Chief Justice James Booth's opinion would serve well as a primer on American government for any student wishing to learn the basic principles underlying a constitutional republic based on representative government, the separation of powers, and judicial review. In particular, Chief Justice Booth distinguished between direct and representative democracy, discussed the constitutional Framers' views on the distinctive forms, provided historical examples illustrating the differences between the forms of representative and direct democracy, and elaborated on the need for a constitution to protect rights and to restrain public passions.

*Rice v. Foster* is notable for another reason – its arguments prefigured the arguments that would later be used in the early twentieth century to challenge the constitutional amendments which incorporated provisions for the initiative and referendum, two components of direct democracy. The initiative, referendum, and recall constituted important planks of the Progressive movement's platform to "be enacted where 'government has in actual fact become non-representative'" because it had been captured by special interests who were indifferent to the interests of the people (Kolko, p. 197). Articulating his understanding of the Progressive's message at their party's convention in Chicago, Theodore Roosevelt declared, "The first essential in the Progressive programme [sic] is the right of the people to rule" (Kolko, p. 196). Joining forces with the Progressive Party's opposition to "the great benefactors of privilege and reaction," Roosevelt declared:

Our fight is a fundamental fight against both of the old corrupt party machines, for both are under the dominion of the plunder league of the professional politicians who are controlled and sustained by the great beneficiaries of privilege and reaction. (Kolko, p. 196)



The weapons whereby people would regain control of their government were “direct Presidential primaries and direct election of Senators, as well as [the use of] initiative, referendum, and recall” (Kolko, pp. 196-197).

The Progressive Movement thus provides the important context for understanding the adoption of the initiative and referendum by various states and the subsequent legal challenges mounted to invalidate the new-found state constitutional status of these Progressive measures. The arguments used to legally combat the initiative and referendum sounded remarkably similar to the representative v. direct democracy arguments articulated in *Rice v. Foster*. However, *Luther v. Borden* had occurred in the intervening interval between *Rice v. Foster* and the early twentieth century court cases challenging the constitutional adoption of the initiative and referendum in Oregon and Colorado and the referendum in Ohio. *Pacific States Telephone & Telegraph v. Oregon* (1912), *Kiernan v. Portland* (1912), *Denver v. New York Trust Co.* (1913), and *Ohio ex rel. Davis v. Hildebrandt* (1916) – all argued that the legislative power had been delegated to the people in violation of representative democracy as part of the republican form of government that was guaranteed by the Constitution – all reached the Supreme Court of the United States – all were dismissed under the rationale that the legal questions were “political in nature and thus lie outside the Court’s jurisdiction” (223 U.S. 118, 119). In dismissing the case in *Pacific States Telephone & Telegraph v. Oregon*, the Court cited the Court’s ruling in *Luther v. Borden*. In dismissing the other cases as constituting political questions whose determination belonged to the political departments of government, the Court cited *Luther v. Borden* and *Pacific States Telephone & Telegraph v. Oregon*.

Another thematic thread of the Guarantee Clause’s jurisprudence uncovered in this chapter centered on the idea of republican government as being anti-discriminatory regarding

gender or race. *Minor v. Happersett* (1875), *United States v. Cruikshank* (1876), and *Plessy v. Ferguson* (1896) all pinned such hopes on the Guarantee Clause. All were disappointed as the Supreme Court rejected the Guarantee Clause arguments as constituting nonjusticiable political questions by citing *Luther v. Borden*. All had their Fourteenth Amendment arguments rejected as well. In *United States v. Cruikshank*, the Court presented an argument analogous to what would be later characterized by Joseph Heller as a *Catch 22*, a type of dilemma from which there is no escape (Heller, p. 52).<sup>27</sup> As a part of the pattern of judicial noninterference with discriminatory action against black citizens, the Supreme Court denied federal jurisdiction by pointing out that the Bill of Rights prohibits violations by the federal government, not state governments and further directed, “For their protection in its enjoyment, therefore, the people must look to the States” (92 U.S. 542, 552). However, when looking to the states, the Court ruled that the rights of due process and the equal protection of the laws as guaranteed by the Fourteenth Amendment applied against state governments, not against individual citizens. The only bright spot in this dismal picture was Justice Harlan’s dissenting opinion in *Plessy v. Ferguson*, the first high Court attempt to characterize racial discrimination as unrepugnant in character. For Justice Harlan, racial discrimination represented a contravention of the Guarantee Clause of the U.S. Constitution. Since racial discrimination violated the foundations of republican government, it presented a justiciable claim for the Court’s resolution. As articulated by Justice Harlan:

Such a system [of racial discrimination] is inconsistent with the guarantee given by the Constitution to each State of a republican form of government, and may be stricken down by Congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. (163 U.S. 537, 564)

Finally, a thematic thread of Guarantee Clause jurisprudence exists that centers on the idea of narrowing the role played by *Luther v. Borden* in eliminating all Guarantee Clause arguments as nonjusticiable political questions. This thread first emerged in *Baker v. Carr* (1962) and was added to by *New York v. United States* (1992). Justice Brennan's majority opinion in *Baker v. Carr* (the case that "inaugurated" the re-apportionment revolution and gave rise to the "one person, one vote" rule) observed that Guarantee Clause claims were not automatically nonjusticiable (Hall, 1992, pp. 57, 59). What had rendered previous Guarantee Clause claims nonjusticiable was the presence of "the elements thought to define 'political questions,' and no other feature, which ... render[ed] them nonjusticiable" (369 U.S. 186, 229). Therefore, before rejecting them out of hand, Guarantee Clause claims should be examined to determine whether any of the elements of political questions were present. If any of the "analytical threads" of political questions were present, then the case should be dismissed; however, if absent, then the case should be heard by the Court (369 U.S. 186, 211). First, the Court pointed out, "[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question" (369 U.S. 186, 209). Second, most political question cases included issues related to the separation of powers doctrine. According to Justice Brennan:

[I]n the Guaranty Clause cases and in the other "political question" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question." (369 U.S. 186, 210)

Two sentences later, Justice Brennan reiterated, "The nonjusticiability of a political question is primarily a function of the function of the separation of powers" (369 U.S. 186, 210). Next, Justice Brennan articulated the various types of argument whereby a political question would be involved:

Prominent on the surface of any case held to involve a political question is found:

- a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- a lack of judicially discoverable and manageable standards for resolving it; or
- the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
- the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
- the unusual need for unquestioning adherence to a political decision already made; or
- the potentiality of embarrassment from multifarious pronouncements by various departments on one question. (Formatting added) (369 U.S. 186, 217)

As a legal historian observed of *Baker v. Carr*'s impact on Guarantee Clause jurisprudence:

Although the justices did not overturn Taney's decision that Guarantee Clause cases presented nonjusticiable political questions, the Court nevertheless narrowed the number of cases they would exclude from their jurisdiction under the political question doctrine. (Hall, 1992, p. 355)

In *New York v. United States* (1992), the State of New York relied on *both* the Tenth Amendment and the Guarantee Clause to buttress its legal argument against the congressional Low-Level Radioactive Waste Policy Amendments Act. In delivering the Court's 6-3 decision, Justice O'Connor noted the case centered on the Nation's "oldest question of constitutional law," a question which "consist[ed] of discerning the proper division of authority between the Federal Government and the States" (505 U.S. 144, 149). The Court's holding has relevance for federalism.

We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, *the Constitution does not confer upon Congress the ability simply to compel the States to do so*. We therefore find that only two of the Act's three provisions at issue are consistent with the Constitution's allocation of power to the Federal Government. (Emphasis added) (505 U.S. 144, 149)

Having pointed out that the nonjusticiability of the Guarantee Clause claims in the Court's history was rooted in *Luther v. Borden*, Justice O'Connor noted that the holding in *Luther* was limited to the issue of deciding "what government is the established one in a State" (505 U.S. 144, 184). Yet somehow, O'Connor continued, "Over the following century, this limited holding metamorphosed in the sweeping assertion that '[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts.' *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion)" (505 U.S. 144, 184). Justice O'Connor next pointed out that the Court itself had "suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. See *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) ("[S]ome questions raised under the Guarantee Clause are nonjusticiable")" (505 U.S. 144, 185). The remark cited from *Reynolds v. Sims* was made by Chief Justice Warren, the author of the majority opinion in the case that represented the conclusion of the reapportionment cases begun by *Baker v. Carr*. Justice O'Connor then noted that contemporary legal scholars had "likewise suggested that courts should address the merits of such claims, at least in some circumstances" (505 U.S. 144, 185).

Justice O'Connor next made the hypothetical assumption that a Guarantee Clause argument was justiciable and examined its applicability to the facts of the case.

[N]either the monetary incentives provided by the Act nor the possibility that a State's waste producers may find themselves excluded from the disposal sites of another State can reasonably be said to deny any State a republican form of government. (505 U.S. 144, 185)

The opinion next explained the reasons for such an interpretation.

As we have seen [in the portion focusing upon the Tenth Amendment arguments], these two incentives represent permissible conditional exercises of Congress' authority under the Spending and Commerce Clauses respectively, in forms that have now grown commonplace. Under each, Congress offers the States a legitimate choice rather than issuing an

unavoidable command. The States thereby retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate. The twin threats imposed by the first two challenged provisions of the Act ... do not pose any realistic risk of altering the form or the method of functioning of New York's government. (505 U.S. 144, 185-186)

The Court concluded its discussion of the Guarantee Clause arguments in *New York v. United States* by observing, "Thus even indulging the assumption that the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute, petitioners have not made out such a claim in these cases" (505 U.S. 144, 186).

It was noted by this writer that one significance of *New York v. United States* resided in a conjecture that in order for claims to be successful against congressional legislation based on the Spending Clause, successful arguments would need to address the conditional tests posed by the Court in its *South Dakota v. Dole* decision. This conjecture was indirectly suggested by Justice O'Connor's statement regarding the incentives contained in the congressional act being challenged. As stated by Justice O'Connor:

As we have seen, these two incentives represent permissible conditional exercises of Congress' authority under the Spending and Commerce Clauses respectively in forms that have now grown commonplace. Under each, Congress offers the States a legitimate choice rather than issuing an unavoidable command. (505 U.S. 144, 185)

Of the three thematic strands of Guarantee Clause jurisprudence, the one most closely pertaining to the purpose of this investigation resides in the Court's statements in *Baker v. Carr*, *Reynolds v. Sims*, and *New York v. United States* which narrowed the scope of the original holding in *Luther v. Borden*. Now, it can be argued, the original holding in *Luther v. Borden* pertains to only one classification of Guarantee Clause arguments, that being the class formed by political questions. The other classification, by inference, includes all Guarantee Clause arguments that don't contain political questions.

Finally, the historic trendline portraying the Guarantee Clause's actual use needs to be taken into account. The mainstream use of the Guarantee Clause has been to justify federal action. The Guarantee Clause has never been used by federal courts to either limit or to invalidate any federal laws in spite of state arguments that such was necessary to preserve a republican form of government. Nor has the Guarantee Clause been used to prohibit or impede congressional action in recognizing that a state either enjoys or lacks a republican form of government. Instead, just the opposite results have occurred. The Guarantee Act provided the basis for the congressional act, noted in *Luther v. Borden*, wherein Congress designated the President as the vehicle for fulfilling the Guarantee Clause's provisions regarding domestic violence. According to the Court:

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act.... [T]he President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress. (48 U.S. 1, 43)

The Guarantee Clause thereby justified President Tyler's recognition of the charter government as the legitimate government of Rhode Island during the Dorr Rebellion. The Guarantee Clause supplied the primary justification for President Lincoln's request to Congress that federal troops be used to restore the southern states to a republican form of government. The Clause's federal guarantee of republican government furnished the basis for the Congressional program of reconstructing the South so that once more its people enjoyed a republican form of government. The Guarantee Clause provided the main foundation upon which the Fourteenth Amendment was constructed. And, finally, the Guarantee Clause, combined with his constitutional responsibility as President to "take Care that the Laws be faithfully executed," supplied justification for

President Eisenhower's order sending "in 500 soldiers of the 101st Airborne Division to preserve true order in Little Rock for the rest of the school year" after the Arkansas National Guard, followed by a mob, had denied "a handful of black children admission to Little Rock High School" during September, 1957 (U.S. Constitution, Article II, § 3; Brogan, p. 648).

When asked if he saw any way in which the Guarantee Clause might be used as part of a challenge to NCLB, Professor Bonfield, a law professor at the University of Iowa, reflected for a moment and then responded, "Not really. It's much more conceivable that the Guarantee Clause would be used by the Federal Government Congress to assert even more control over education in this country than what they currently have" (Bonfield, 2009). The argument that could be used by Congress would be that an educated citizenry is essential for the maintenance and perpetuation of a republican form of government in the various states. Given the importance of education in today's world, given the role that education plays in preparing young people for careers and work, given the Court-recognized importance of education in preparing students for the exercise of their responsibilities as citizens, and given the disparate performances of the various state systems of public education, such an assertion would be plausible. Such a move, moreover, could be difficult to challenge. According to the case law, which runs from *Luther v. Borden* to the modern-day, Congress is the main determiner of what constitutes a republican form of government. Also, congressional determinations regarding a republican form of government do not present a justiciable cause of action for the courts, according to an impressive array of the case law centering on the Guarantee Clause.

Of course, such a policy course would violate the use of federalism as a public policy approach. Such a policy approach would also require much adaptive work to overcome long traditions of state control of public education which generally incorporate features of local



control through publicly elected boards of education in each of the school districts. A cynic might suggest that the adaptive work of undercutting the current system of public education has been underway for some time on the part of critics. The federalizing of public education would violate the “teamwork” component of Senge’s systems thinking as well. Given the public’s support of local control of education, however, it’s difficult to envision an outright federal takeover of education in this country. And actually, Professor Bonfield didn’t view either possible use of the Guarantee Clause as likely. In his opinion, either use of the Guarantee Clause was unlikely (on the one hand, to challenge federal legislation regarding public education; on the other, to assert greater federal control of public education).

The Guarantee Clause cases comprise slightly less than half (46%) of the total federalism cases being examined by this writer. The remaining cases (54%) divide unequally between the Tenth, Eleventh, and Fourteenth Amendments. The next chapter will examine the federalism case law that emerged from the Tenth Amendment.

## **Chapter 6**

### **The Tenth Amendment**

#### **Introduction**

The Tenth Amendment to the Constitution of the United States is the only amendment in the Bill of Rights that doesn't act to protect the rights and liberties of individuals. Instead it acts to protect the powers of state governments and reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" (Farrand, IV, p. 95). During the state conventions that ratified the Constitution, the anti-Federalists demanded that amendments be added to the proposed document in order to prevent subsequent tyrannical actions by the national government being constituted. As one journalist noted, "[T]he Tenth Amendment was the only part of the Bill of Rights that was recommended by all the state conventions that submitted proposed amendments" (Monk, p. 194). It was added because of widespread "support for an explicit guarantee that the states should retain control over their internal affairs" (Hall, 1992, pp. 861-862).

Article II of the Articles of Confederation served as the Tenth Amendment's antecedent: "Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled" (Farrand, 1913, p. 212). Much would be made of the phrase, "expressly delegated," in subsequent years as will be shown in discussing both the historical background and the case law of the Tenth Amendment. That phrase had kept the Congress under the Confederation "from carrying into effect the few powers with which it had been entrusted," which was one of the reasons the phrase was not included in the newly added amendment (Hall, 1992, p. 862).

#### **Historical Background**

**An american political fault line: From the articles of confederation to the constitution of the united states.**

***Introduction.***

Clashes involving the Tenth Amendment reveal a primordial fault line in American politics with local and state rights located on one side and national government supremacy situated on the other. Unlike Athena springing full-grown from the forehead of Zeus, the United States did not begin its existence as a nation with the creation of the Constitution, but rather developed through a series of related events over time. Similarly the origins of this deeply-rooted argument about government powers lie intricately embedded in the historical evolution of this country from a collection of individual British colonies to united States declaring their independence to a confederacy in which the states reigned supreme to a constitutional republic based upon representative democracy, upon separation of powers (horizontal division of power between the judicial, legislative, and executive branches of the federal government), and upon federalism (vertical division of power between the state and federal governments). Movement from a group of separate colonies to a nation under the present Constitution of the United States also illustrated the fact that adaptive work often requires time, e.g., changed values whereby the major focal point of allegiance switches from ones colony to the nation.

Finally, political clashes along America's fault line presaged the legal clashes contained in the case law of the Tenth Amendment. This chapter will trace these political clashes, beginning with the Articles of Confederation and moving forward to the first legal clash, *McCullough v. Maryland*, the case that begins the "case law" section of this chapter. These political clashes provide the historical context required to more fully understand the ensuing legal battles over government sovereignty in the United States. Arguments used in the political clashes prior to *McCullough* were subsequently employed by both sides in the courtroom battles,

and thus emphasize the continuity of the primordial struggle for sovereignty between local and central governments in American life.

***The articles of confederation.***

Written subsequent to the Declaration of Independence, the Articles of Confederation, according to one historian, were based on original, revolutionary principles.

Original principles signified Revolutionary principles... And it meant whatever men chose it to mean: to men like Governor Clinton of New York..., original principles signified as little government as possible, a federation wherein each state would remain sovereign, with Congress at their disposal. Had not the Articles of Confederation been written with this idea uppermost? (Bowen, p. 8)

Historically, the Articles of Confederation denote the high water mark of state sovereignty. As one constitutional scholar noted, the Articles of Confederation flowed naturally from the sentiments of those who declared their independence from the tyrannies of English rule.

When the Articles had been anticipated in 1774, mulled over in 1776, proposed in 1777, and finally ratified in 1781, a confederate, congressional form of government was clearly what most Americans wanted to handle their common affairs. It had to be confederate because they were in no mood to give a faraway, central regime in the United States what they were busy denying to a faraway, central regime in Britain... It had to be congressional because they were in no mood to give an independent executive in the United States what they were busy denying to an independent executive in Britain. (Rossiter, p. 47)

Sometimes referred to as the “first constitution of the United States,” the Articles of Confederation granted only a limited authority to the national government and further “made the exercise of the limited authority it granted almost exclusively dependent on the good will of each of the thirteen states” (Rossiter, p. 50). The government of the United States “could resolve and recommend but could not command and coerce” (Rossiter, p. 52) The good will of each state that was necessary for national action depended upon its citizenry, many of whom fit the following characterization: “[T]he pioneering yeoman developed a self-respecting dependence

on those around him and a headstrong independence of those remote from him” (Rossiter, p. 27). Such attitudes favored putting individual state needs above those of the federation as a whole, thus making national action difficult to achieve.

General George Washington’s aide-de-camp, Alexander Hamilton, first experienced the weaknesses of the national government and its dependence upon the good will of the states in rather direct fashion at Valley Forge. Consequently Hamilton turned his attention to the Articles of Confederation. With subsequent events having verified his initial analysis, Hamilton pointed out its flaws to James Duane, the President of Congress, in a letter written September 3, 1780.

According to Hamilton:

The fundamental defect is a want of power in Congress.... [I]t has originated from three causes – an excess of the spirit of liberty which has made the particular states show a jealousy of all power not in their own hands, and this jealousy has led them to exercise a right of judging in the last resort of the measures recommended by Congress, and of acting according to their own opinions of their propriety or necessity, a diffidence in Congress of their own powers, by which they have been timid and indecisive in their resolutions... (Syrett, 2, p. 401; hereafter referred to as PAH)

And, expressing an interpretation precursive to an opinion he delivered some eleven years later to President Washington as a member of his first cabinet (as well as Chief Justice Marshall’s paraphrase of Hamilton’s interpretation in the first Supreme Court case involving the Tenth Amendment, *McCullough v. Maryland*) regarding the powers of the federal government relative to the establishment by Congress of the First Bank of the United States, Hamilton declared, “Undefined powers are discretionary powers, limited only by the object for which they were given – in the present case, the independence and freedom of America” (PAH, 2, p. 401). Hamilton thought that a convention should be called to remedy what he regarded as a “defective”

political structure that “requires to be altered” (PAH, 2: 402). He further characterized the existing confederation:

[I]t is neither fit for war, nor peace. The idea of an uncontrollable sovereignty in each state, over its internal police, will defeat the other powers given to Congress, and make our union feeble and precarious. There are instances without number, where acts necessary for the general good, and which rise out of the powers given to Congress must interfere with the internal police of the states.... The confederation gives the states individually too much influence... (PAH, 2, p. 402)

***The constitution of the united states.***

Events during the 1780s convinced others of the deficiencies of the Articles of Confederation as well. According to one constitutional historian:

By 1787 men like Washington and Madison had come to see the commercial, financial, social, and diplomatic disorders of the new Republic as primarily political in character.... [T]he trouble with the United States was that it was governed hardly at all.... [T]hey also saw these disorders as primarily national in scope. (Rossiter, p. 46)

Originally, “[s]eventy-four delegates were named to the Convention at Philadelphia; in the end fifty-five turned up” (Bowen, p. 11). By the time the fifty-five delegates convened for the Constitutional Convention in 1787,

[F]orty-two of the Framers had already served at one time or another in the Congress of the United States, and thus had been given a chance ... to find out for themselves what it meant to pursue national ends through confederate means. (Rossiter, p. 145)

In addition, “[a]ll but two or three Framers had also served as public officials of colony or state” (Rossiter, p. 146).

According to Professor Rossiter, the Framers intended to develop a charter for government that would be “a faithful reflection of the ideas of the Revolution, which all of them agreed had been stated most forcefully in the Declaration of Independence” (Rossiter, p. 59).

They also intended that whatever was developed would be “a creative synthesis of the best

previous efforts to convert [the ideas contained in the Declaration of Independence] into institutions, which most of them agreed had taken place in Massachusetts, Virginia, and New York” (Rossiter, p. 59). In spite of these intentions, the Convention almost foundered upon the idea of representation in Congress, the large states favoring population and the small states demanding equality of representation. The Framers wrestled with this issue for fourteen working days in extreme summer heat, from June 27th to July 16th (Farrand, I, pp. 437-606; Farrand, II, pp. 1-20). The small states regarded equal representation as a guarantee of their continued viability. According to the small-state delegates, “[A]nything short of ‘equality of voice’ in one branch would mean an end to the state governments and, in time, to the states themselves” (Rossiter, pp. 192-193).

What emerged at the end was a compromise in which one legislative house was based on population while the remaining body was based on equal representation. Rossiter referred to the compromise as “the invention of American federalism” and found it ironic that it resulted from what he described as “an ill-tempered struggle for power” (Rossiter, p. 193). State sovereignty was reined in as the lead horse for American government. In its place stood federalism, consisting of the Great Compromise, enumerated powers of the national government, and powers prohibited from being exercised by the states. Professor Rossiter described the situation of the states under the new Constitution:

The Great Compromise was a confirmation of the states as states, as communities that never had been and never would be sovereign nations, and yet always had been and still meant to be discrete, self-conscious, indestructible units of political and social organization. (Rossiter, p. 193)

Such is the ancient fault line of sovereignty in American history from colonial beginnings through the Constitutional Convention, the jagged line recording the movement of the subterranean plates of state sovereignty and federal supremacy as they moved against each other

to gain a position of preëminence. Moreover, tremors along this fault would continue to be felt throughout the nation's history up to and including present-day disagreements.

**An american political fault line: Tremors subsequent to the constitutional convention.**

***Introduction.***

The Great Rift Valley marks where eastern Africa and the Middle East almost split off from the African continent just as the Greenleaf fault (running from the tip of Lake Superior in Minnesota to a point near Greenleaf, Kansas) marks where the North American continent almost split apart eons ago. In similar fashion we can trace the jagged lines of demarcation between the state rights position and that of federal supremacy as played out against republican ideas and pragmatism through varied constitutional arguments in America's political and legal life. The fault line reveals itself in arguments regarding the nature of the Constitution, how it should be interpreted, who should interpret its meaning – all these arguments divide along the fault line separating state rights and national supremacy.

The fault line is also revealed by events and their accompanying documents that contain both political and legal opinions. Major events include arguments over the constitutionality of a Bank of the United States that occurred in President Washington's first administrative cabinet, the Kentucky and Virginia Resolutions, and the Nullification and Secession Crises that culminated in the Civil War. Key documents that reveal the state rights position include the Articles of Confederation, Madison's opposition as a member of the House of Representatives to the First Bank of the United States, Jefferson's authorship of the Kentucky Resolutions, Madison's authorship of the Virginia Resolutions, and the use of both resolutions by southerners in the nullification and secession controversies. Key documents that reveal a strong central government position include the *Federalist*, Hamilton's analysis of the weaknesses of the



Confederation in his letter of 1780 to James Duane, Hamilton's opinion as Secretary of the Treasury to President Washington regarding the constitutionality of the proposed Bank of the United States, and several Supreme Court rulings which answered questions regarding the nature of the Constitution as well as who should interpret its meaning.

How one would answer the following questions would depend upon one's stance regarding sovereignty, either state rights or federal supremacy:

- Is the Constitution a compact of the state governments, thus deriving its powers from the various states, or is it a compact flowing from the people and thereby deriving its powers from them?
- Is the Constitution a general blueprint for American government or instead a detailed plan?
- Who should interpret the Constitution?
- Should the Constitution be interpreted broadly, which would include implied powers, or should it be interpreted strictly according to its literal meaning?

As might be surmised by an astute and knowledgeable reader, an individual favoring state sovereignty would provide answers different from an individual favoring federal supremacy.

Generally, a state rightist argued that the Constitution was a compact of the various state governments, that it was a detailed plan that should be interpreted strictly according to its literal meaning, and that state governments could determine the constitutionality of congressional actions. Conversely, a federal spokesperson argued the opposite. The Supreme Court would be the final arbiter of these questions and has provided definitive answers to the first and third questions. What continue to be argued today are questions about how to interpret the

Constitution, which has some implications for the question of whether the Constitution is a general blueprint or a detailed plan.

To more fully illustrate the sovereignty fault line in America's political and legal life, the remainder of the historical section of this chapter will focus on two events that presaged the legal clash initiated by *McCullough v. Maryland*. First, the multiple events culminating in a constitutional argument within President Washington's Cabinet will be fully examined. Second, the events, as well as the subsequent consequences, surrounding the Kentucky and Virginia Resolutions will be presented and analyzed. Each event will receive further introduction. As will be shown, both events illustrate legal arguments regarding sovereignty that were subsequently used before the Supreme Court.

***Constitutional arguments in president washington's cabinet re: Hamilton's economic proposals.***

*Hamilton's economic proposals for america: Introduction.*

In order to understand the constitutional debate within Washington's Cabinet, one needs to understand the intricate intertwining of economic and political factors underlying the constitutional issues. To further understand the constitutional debate, one also needs to understand Hamilton's economic proposals as well as the other political factors operating at the time. In order to understand Hamilton's two-phased economic proposals, one needs to understand the specific problems of the American economy at the time that Hamilton's proposals were designed to alleviate. In order to understand the nexus between America's economic problems and Hamilton's economic solutions, one needs to understand Hamilton's analysis of the nation's economy. Furthermore, to understand the opposition to Hamilton's economic proposals, one needs to understand the influence of specific political and economic perceptions behind the constitutional arguments presented against Hamilton's proposals. Finally, the entire

event, in all of its contextual understanding, needs to be viewed as part of the much larger picture, that of the adaptive work required in changed values and focal points of primary allegiances in the movement from colonies to states to a nation. All of the preceding viewpoints were represented in the debates inasmuch as the key players, having witnessed the adaptive work described, held a continuum of viewpoints reflecting that period of development.

The first constitutional argument involved three Virginians who were opposed by an immigrant from the West Indies residing in New York. First, the Virginians: James Madison, a member of the House of Representatives; Thomas Jefferson, Secretary of State; and Edmund Randolph, Attorney General. The immigrant opposing this distinguished trio of native sons was Alexander Hamilton, Secretary of the Treasury, who had fought in the Revolution and had attended the Constitutional Convention as one of New York's delegates. Between the two of them, Hamilton and Madison authored 90% of the eighty-five numbered articles comprising *The Federalist*.<sup>28</sup> They parted company, however, over Hamilton's proposals for ensuring the stability and prosperity of the new country's economy.

*Hamilton's economic proposals for america: The context of the economy.*

To understand Hamilton's proposals, one needs first to understand the condition of the American political economy in the aftermath of the American Revolution and the Articles of Confederation.

In theory, the financing of the war was to have been simple – the states supplying the funds and the Continental Congress disbursing them; but in practice both the states and Congress had spent large sums directly and on their own initiative. (McDonald, 1979, p. 144)

During the war, Congress issued unsecured paper money, bonds in the form of loan office certificates, and promissory notes for supplying and paying the army. The paper money alone had a "gross face value of more than \$200 million," but had depreciated to almost nothing "and

had been officially devalued at a ratio of 40 to 1” (McDonald, 1979, p. 147). The value of the loan certificates had been adjusted to approximately \$11 million while the “army-related debts, originally a nightmare of confusion,” had been “‘liquidated’ by the issuance of new certificates” (McDonald, 1979, p. 147). By 1789, “about \$16 million in army certificates and related securities remained outstanding” (McDonald, 1979, p. 148). According to noted economic historian, Forrest McDonald, “Existing arrangements for servicing these debts ranged from nearly adequate to nonexistent” (McDonald, 1979, p. 147). Not only were many debts still outstanding, the interest payments on the existing debts were not being paid. “Outstanding arrears of interest on the various forms of national debt was \$13 million, making a grand total ... of about \$40 million” (McDonald, 1979, p. 148).

As if the various paper debts of Congress were not problematic enough, the war debts of the various states further compounded the country’s economic problems. By the end of 1789 the combined debts of the states were estimated by Hamilton to be somewhere “between \$21 and \$25 million” (PAH, 6: 119). The responses of the states to their own debts further complicated an already tangled web of state war debts. Some states had no existing debts while others had “enormous debts by the end of the war” (McDonald, 1979, p. 148).

Some, Massachusetts and South Carolina for instance, attempted to manage their debts honorably but proved unable to collect the high taxes they levied to service them and thus remained deeply in debt in 1789. On the other extreme, Rhode Island, Virginia, and North Carolina employed more or less fraudulent means to retire a large part of their obligations. In between were those few states that proved both able and willing to service their debts on a fair and equitable basis. (McDonald, 1979, p. 148)

Finally, there remained the matter of foreign loans. Over the course of the Revolutionary War, the United States received slightly more than \$10 million in foreign loans (McDonald, 1979, p. 145). Rounded off, the loans were:

- \$4.4 million from the French royal treasury;
- \$1.8 from Dutch bankers that was guaranteed by the French government;
- \$3.6 million directly from Dutch bankers that was not guaranteed by a friendly government; and
- \$175,000 from the royal treasury of Spain.

Compounding the problem of foreign loans, “the United States was \$1.6 million in arrears for interest payments on these various loans and nearly \$1.4 million in arrears on scheduled repayments of principal. Additional repayments of principal were falling due at a rate of \$463,000 a year” (McDonald, 1979, p. 145). As one historian noted of the young country’s economic situation, “The Americans were oppressed by all manner of debts, and the means of paying them seemed to be lacking” (Brogan, p. 194). He concluded that “[p]ublic credit was exhausted” (Brogan, p. 195). Another historian summarized the Revolution and its aftermath more cogently:

In the early days of the Revolution, when patriotic enthusiasm was sufficient to sustain the cause, Congress had had credit in abundance. But the supply of public credit based upon goodwill was soon exhausted; ordinary Americans and their duly elected representatives, it turned out, loved liberty so dearly that they were willing to pay for it with anybody’s dollars but their own. Consequently, the public had earned a credibility rating of nearly zero. (McDonald, 1979, p. 143)

*Hamilton’s economic proposals for america: Hamilton’s analysis & proposals.*

The major task facing Hamilton as the first Secretary of the Treasury under the Constitution was a daunting challenge – bringing order to the young republic’s finances.

Hamilton’s analysis of the nation’s condition and needs merited this historical description:

He was in any case determined to provide for these men [a dynamic merchant class] a national economic context in which their energies could function. That context should include capital in mobilizable form, readily accessible credit both foreign and domestic, a stable currency for the

transaction of business, and government encouragement for the kinds of enterprise that would be of greatest benefit to the entire community. (Elkins & McKittrick, p. 116)

The historians continued their summary of Hamilton's analysis:

Parallel with Hamilton's projection for America as a society was one for the United States as a government. The government required a sound system of taxation, undoubted stability of credit both national and international, an orderly funding of the several complicated layers of public indebtedness that had grown out of the Revolution, and a banking institution to provide a dependable circulating medium and to manage the government's day-to-day fiscal affairs. The carrying through of both these projections would result in a nation strengthened in every possible way. (Elkins & McKittrick, p. 116)

Hamilton laid out his proposals for the nation's political economy over the course of a year in a series of reports to two sessions of Congress. The dates, titles, and subject matter (second and third reports only) follow:

- January 9, 1790      "Report on the Public Credit" (PAH, 6, p. 65-168)
- December 13, 1790    "First Report on the Further Provision Necessary for  
Establishing Public Credit" [Taxation] (PAH, 7, pp.  
210-236)
- December 14, 1790    "Second Report on the Further Provision Necessary for  
Establishing Public Credit" [Bank of the United States] (PAH, 7,  
pp. 236-342)
- January 28, 1791      "Report on the Establishment of a Mint" (PAH, 7, pp. 462-607)

While discussing Hamilton's analysis and proposals for America's political economy, one historian observed, "His understanding of the economic forces at work in the world was profound, and he relied on them to build up the United States" (Brogan, p. 264). Part of that understanding was based on a research technique that "Hamilton more or less invented" in order to get accurate information about a variety of economic activities (McDonald, 1979, p. 139).

Beginning in October of 1789, Hamilton “conducted a large-scale socioeconomic research project using questionnaires” with the first questionnaires being sent to customs collectors at the various ports and financial centers (McDonald, 1979, p. 139). As a result, his “storehouse of information placed his understanding [of the nation’s economy] qualitatively beyond [anyone else’s] reach” (McDonald, 1979, p. 140). A major part of Hamilton’s understanding of the ways in which economic forces worked was gained from reading a wide variety of economic writings, both theoretical and practical, and from studying the economic institutions of other countries, e.g., the Bank of England. Major theoretical influences included the Scottish thinkers, David Hume and Adam Smith, and Jacques Necker, the French Minister of Finance. Writing well before the term “systems thinking” became widespread in graduate schools, Necker had written, “Administrative genius [is] the capacity to perceive, simultaneously, the whole of a system and the relations of all its parts to one another and to the whole, and to discern instantly the effects of a change in any of the parts” (McDonald, 1979, p. 135).<sup>29</sup> As to how Hamilton applied Necker’s concept, two other historians, writing about the genesis of Hamilton’s proposals for the American political economy, unwittingly supplied the answer. First, they set the stage:

As to how it [Hamilton’s economic designs] evolved, the process may perhaps be pictured as going on at two levels. One was the level of theory and imagination, that of the conception in its total sweep. The other was that of practical detail and of specific choices (Elkins & McKittrick, p. 115)

Next, they provided an explanation:

There is a characteristic device of Hamilton’s mind which is discernible at almost every stage of his reasoning, and seems also to furnish the key to certain of his critical choices in the translation of theoretical predilections into practical policy. The device is that of the projection: an ordering of facts and circumstances into patterns which present conditions have not as yet made actual but which future ones will. (Elkins & McKittrick, p. 115)

Finally, they provided an example:

On the very highest plane, Hamilton's imagination was dominated by a projection of what America could and ought to become [the interaction of multiple systems]. It was a vision ... of economic growth and economic development. The *potential* for growth – an expanding population, limitless natural resources, vast tracts awaiting tillage, a vigorous people – was certainly there. The problem was one of execution, of how the potential was to be made real. Up to this time there had been two massive difficulties [each representing a system]. One was political in nature, the question of a government with the power to act. This had been for the most part solved [with the adoption of the Constitution]. The other difficulty was economic. It was this challenge – that of how the economic energies of the people might best be mobilized – that Hamilton now intended to meet, to the extent that the initiative of the United States Treasury could shape the result. (Elkins & McKittrick, p. 115)

*Hamilton's economic proposals for america: Phase one.*

So what exactly did Hamilton propose to restore the nation's credit and its financial credibility? Despite rumors that the young country should repudiate its debts, Hamilton proposed to not only honor the national debts, but also to fund them. Funding the debt meant a number of things.<sup>30</sup> First, the debts would be refinanced. Second, the debts would have first priority on government revenues that in effect provided a guarantee of payment, particularly of interest payments, which made refinancing both more credible and attractive to financiers and foreign bankers. Third, funding the debt left the decision about when (sooner, later, or never) to retire the principal to the government's discretion. Fourth, not immediately paying the principal avoided draining a limited supply of money; in effect, monetization of the public debt increased the availability of money for all economic classes. Fifth, and critically important, funding the national debt enhanced the nation's credit rating with foreign banks, particularly the Dutch, who at that time were the major financiers in Europe.

Next, Hamilton proposed that the national government assume responsibility for the debts incurred by the states in prosecuting the Revolutionary War. In effect, this would bind all state creditors to the new republic's government. It also placed all of the states on a similar economic



footing regarding war indebtedness. Hamilton had some political and legal justification for assumption.

From the very beginning there had been the understanding, which was written into the Articles of Confederation, that the costs of the Revolution were to be borne by the United States in its character as a national government and not by the several states acting individually. (Elkins & McKittrick, p. 119)

In subsequent reports Hamilton proposed tariffs and excise taxes to provide funds for the national treasury, a mint to coin money, and a Bank of the United States to facilitate government financing and the collection of revenues. Of Hamilton's proposals, two aroused political opposition – the assumption of state war debts and the bank. The latter, because of politics, devolved into constitutional arguments. But first, the opposition to the assumption of state debts by the national government will be discussed because the settlement of that issue became intertwined with the constitutional issues being raised as part of the political opposition to the bank. Virginians played critical roles in both issues.

The assumption of state debts was not quite as simple as it might seem on the face of it. While debts indeed were incurred, there was also the matter of reimbursement by the national government for state expenditures related to the war effort that didn't necessarily involve state borrowing for the funds. Both issues intertwined. The situation was both tangled and complex; insisting "upon strict and uniform accounting procedures" as an approach to settling the issue of reimbursement to states for their war-effort expenditures was "hopelessly impracticable," according to two historians of the period (Elkins & McKittrick, p. 119). They explained:

In case after case the line between expenditures authorized by the Continental Congress and those not so authorized could not be maintained. Some states had spent money on expeditions that were not authorized but turned out to be very useful; others had assumed expenses that properly belonged to the Continental government; many of the southern states – Virginia in particular – had either failed to keep proper records or else had

lost them as a result of British invasions. Finally, the size of the expenditures as well as the mode of financing them had varied considerably from state to state. Massachusetts, Virginia, and South Carolina all claimed very large expenditures. Massachusetts had kept careful records but wanted credit for a major undertaking ... which had not been authorized.... Virginian could show little evidence for what that state had expended in its struggle to repel the British invasions of 1779-80. (Elkins & McKittrick, p. 119)

“To make matters still more complex,” the historians continued,

Virginia had by 1789 paid off a large part of its state debts while South Carolina and Massachusetts were still burdened by huge debts which they had no wish to scale down but which, with their limited tax resources, they could not continue to support. (Elkins & McKittrick, pp. 119-120)

Hamilton’s plan to assume debts also accepted all state expenditures in support of the war effort, whether authorized by Congress or not, which offered something to everyone. States would be credited for expenditures, debited for their share of the national defense, and those states that emerged as creditors at the end of the process would “receive a final compensation from the federal government” (Elkins & McKittrick, p. 120).

*Hamilton’s economic proposals for america: Political opposition to phase one.*

Opposition to Hamilton’s proposals existed, however, despite their promise for establishing a sound public credit for the nation. As one historian described the situation, “In Congress there were two sets of ready-made enemies of Hamilton’s proposals. One can be loosely described as the frontier faction, consisting of representatives from Georgia, the back country of South Carolina and Pennsylvania, and northern New Hampshire” (McDonald, 1979, p. 173). Most were anti-federalists and suspicious of strong national governments. An economic bond also united them as “nearly all were engaged in trying to make a fortune through the purchase of state-owned lands with depreciated public securities” (McDonald, 1979, p. 174).

Hamilton's plan to assume state debts would raise the market price of the public securities, thus spoiling "these speculators' lucrative game" (McDonald, 1979, p. 174).

The remaining set of Hamilton's "ready-made enemies" consisted of "special-interest politicians based in the tobacco-growing regions of Maryland, Virginia, and tidewater North Carolina" who were led by James Madison (McDonald, 1979, pp. 173 & 174). Although most of the tobacco-growing legislators agreed that the nation needed strong public credit and that Hamilton's proposals would help secure that result, "they were prepared to drive a hard bargain, to demand particular advantages for their region as the price for allowing the funding system to become law" (McDonald, 1979, p. 175).

Putting their special interests ahead of national interest was habitual with planters in the tobacco belt, and just now they had compelling reasons for doing so: early frosts had wiped out half the tobacco crop, and the bizarre money market prevented tobacco prices from rising enough to make up more than a fraction of the losses. In those circumstances, they were in no mood to pay taxes for the support of a public debt of which they held but little. They were even less eager to have the settlement of state accounts divorced from politics, for that would cost them millions. (McDonald, 1979, p. 175)

The hard bargain, as it turned out, consisted of permanently locating the nation's capital on the Potomac in return for supporting Hamilton's initial proposal to establish the nation's public credit. Not so coincidentally, Madison and a fellow Virginian, Henry Lee, had spent £4,000 pounds acquiring lands on the Potomac where they hoped the capital city would be located (McDonald, 1979, p. 175). On June 20, 1790 Thomas Jefferson hosted a dinner meeting for Hamilton, Madison, and himself after having brokered a compromise with Senator Robert Morris on temporarily moving the capital from New York to Philadelphia where it would remain for a period of time before being permanently moved to the Potomac in return for Senate passage of assumption (McDonald, 1979, p. 184). At the dinner meeting a quid pro quo was arranged

whereby Madison would find the votes necessary in the House for Hamilton's assumption proposal, Hamilton would find the necessary extra votes in the Senate to remove the capital from New York to its temporary home in Philadelphia, and Hamilton would "help the Virginians obtain a better financial deal for their state" regarding their expenditures during the Revolution (McDonald, 1979, pp. 184 & 185).

Had Hamilton's proposal for resurrecting the nation's public credit not been enacted, the consequences could have been dire. The government's only source of revenue was the 1789 tariff that constituted the nation's only tax. It would not have generated enough revenue to service the foreign debt, the domestic debt, nor meet the yearly expenses of government. Servicing only the foreign debt cost in excess of "\$1 million a year" which would have taken most of the funds generated by the tariff (McDonald, 1979, pp. 145 & 146). Hamilton had already sought "a postponement of the debts due France" (McDonald, 1979, p. 146). An economic historian summarized Hamilton's thinking about the possible disaster and how to avert it.

If the United States could be temporarily freed from that obligation, it could quickly bring itself up to date with its Dutch banking creditors and thus be in a position to negotiate a new loan in Holland large enough to repay all its foreign debts. That done, the annual interest would be only \$500,000 to \$600,000, an entirely manageable sum. (McDonald, 1979, p. 146)

A solid credit rating was necessary, however, before the Dutch bankers could be approached. When analyzing the domestic debts, both of the nation and of the states, an additional complicating factor emerged. After the Constitution had been approved, which stipulated that Congress now had taxing power, Dutch bankers began buying up huge quantities of depreciated securities. All parts of Hamilton's proposal for public credit interlocked, i.e., funding the debt, assumption, etc., so that without any one part, the whole was bound to fail. Certainly, "without

the Dutch all hope of establishing public credit would have been forlorn” (McDonald, 1979, p. 177). Congress, however, eventually enacted all the critical pieces of Hamilton’s proposal for establishing public credit. One piece of the quid pro quo dinner party arrangement (locating the capital permanently on the Potomac) that facilitated this achievement would be responsible, however, for escalating a political disagreement about the United States Bank into a constitutional argument.

*Hamilton’s economic proposals for america: Phase two.*

On August 12, 1791, Congress adjourned. Prior to leaving the House had passed a resolution instructing Hamilton to make further reports on the nation’s public credit, “by which it was understood that he would draw up plans for further taxes and for a national bank” (McDonald, 1979, p. 188). The House expected Hamilton to have the reports ready when they reconvened in December in their new temporary capital, Philadelphia. To increase government revenues, Hamilton drew up plans for a graduated system of excise taxes to be levied on alcoholic beverages. He also began drafting a report for the national mint that would be located in Philadelphia. The bank served as the final piece of Hamilton’s plan for America’s economic system. And it was a *system* that Hamilton had in mind, all parts working cooperatively to promote the country’s economic health. One analyst commented, “Hamilton saw things differently, and from more perspectives, than other men did” (McDonald, 1979, p. 189). To illustrate his point, he provided two contrasting views of the public debt. First, the commonly held view:

[T]he public debt had been an enormous number of pieces of paper, representing pledges of various American governments to pay various amounts to the bearers, if and when government should so decide, and to pay a stipulated rate of interest in the meantime. Until 1790 each of the governments that coped with those pieces of paper regarded them negatively and directed its efforts toward retiring them in one way or another. As a

consequence, the paper was a national burden, politically divisive and economically destructive. (McDonald, 1979, p. 189)

And now, Hamilton's view of the public debt:

Viewing the problem differently, Hamilton brought about funding, assumption, and the sinking fund, which transformed the paper into a form of capital. Moreover, a huge amount of new capital was created into the bargain: the market value of the paper a few months before Hamilton took office had been less than \$15 million; by the end of 1790 it was about \$45 million. Thus \$30 million in liquid capital had been manufactured, as it were, out of thin air. Indeed, the new capital was made of stuff even more ephemeral: all that happened was that the public, instilled with illusions and expectations, changed its opinion about the value of those pieces of paper. (McDonald, 1979, p. 189)

Hamilton's plans for funding the debt had created "a pool of liquid capital for economic development;" however, to help the capital operate for its intended purpose, an additional step was required (Elkins & McKittrick, p. 226). There needed to be

An arrangement whereby it should be to the advantage of individual security-holders to place both securities and specie at the disposal of a public institution – thereby achieving a new level of concentration – that could make these resources accessible to the entire mercantile community. This, Hamilton believed, could be achieved by the creation of a large national bank. (Elkins & McKittrick, p. 226)

The bank that Hamilton proposed would render a number of important services to both the government and the business world. The Bank of the United States

would serve as the government's chief fiscal agent, assisting in the collection of taxes, the disbursement and transfer of funds, and the provision of immediate short-term credit whenever needed. A ready source of funds, moreover, would be present in time of national emergency. The bank's notes would provide a universally acceptable and convenient currency for an economy traditionally short of specie. Of special importance, however, was that by means of its capital base of specie and federal securities ... the bank could provide to the mercantile community a large, dependable, and convenient source of credit for expanding business projects. (Elkins & McKittrick, p. 226)

In writing the proposal for the bank he envisioned, Hamilton made extensive use of the Bank of England, even to the point of copying the English bank's charter verbatim in places (McDonald, 1979, p. 194; Elkins & McKittrick, p. 227). However, the two banks differed in important respects which one historian attributed to "Hamilton's study of Necker's experiences in France" (McDonald, 1979, p. 194). "The Bank of England was designed solely as an instrument of public finance. Its capital consisted exclusively of public debt" (McDonald, 1979, p. 194). The English banks commercial relations were "secondary to its functions as an instrument of government" (McDonald, 1979, pp. 194-195). In contrast, "only three-fifths of the [U.S.] bank's total capital should consist of government securities, rather than all of it as was the case with the Bank of England" (Elkins & McKittrick, p. 227). In Hamilton's design, the bank's "main function would be to provide a large, stable, but flexible national money supply for the financing of ordinary business and general economic development" (McDonald, 1979, p. 195).

Moreover, Hamilton insisted that it be operated for the private profit of its stockholders, thus making it in the interest of the stockholders to run it properly. If it were operated as an instrument of public policy, the temptation toward abuse through fiscally unsound practices would, soon or late, prove irresistible to people in government. (McDonald, 1979, p. 195)

Hamilton further intertwined the bank with assumption, the funded debt, and sound public credit through his proposal for purchasing shares in the Bank of the United States. Government securities, whether national or state, would be accepted at face value with payment for the bank shares made at a ratio of "three-fourths in securities to one-fourth in specie" (Elkins & McKittrick, p. 226).

*Hamilton's economic proposals for america: Political opposition to phase two.*

Like Hamilton's previous proposal for the assumption of state war debts, the Bank became entangled with the issue of the permanent location of the nation's capital on the Potomac

that was scheduled to occur in 1800. The Bank was to be located in Philadelphia, described by one historian as being, at that time, “the first city of America” (Bowen, p. 21). The largest city in the nation in 1790 with a population exceeding 45,000, Philadelphia was more than a quarter larger than its nearest rival, New York City (Rossiter, p. 25). After London, Philadelphia was Great Britain’s second largest city, described as “the most prosperous and populous city of the colonies (Knauer, p. 54). Moreover, it had patriotic prestige, having served as the seat of both the First Continental Congress in 1774 and the Constitutional Convention in 1787. Finally, the Declaration of Independence, the country’s original charter, had been signed in Philadelphia’s Independence Hall in 1776. These factors combined to inspire fear on the part of the Virginians and other southerners that the compromise regarding assumption and the permanent location of the nation’s capital on the Potomac might be threatened. The combination of the city’s prestige and the influence of such a powerful institution as the Bank could operate as a force for keeping the national capital in Philadelphia. Such fears were given legitimacy by two developments. First, when Madison and Jefferson arrived in Philadelphia, “they were shocked to hear the Pennsylvania members of Congress declare openly ‘that they never intended to aid in a removal’ of the capital to the Potomac” (McDonald, 1979, p. 200). Second, “the Pennsylvania House of Representatives voted to appropriate money to build permanent buildings for the federal government in Philadelphia,” a measure that was later not approved by the state’s other legislative chamber (McDonald, 1979, p. 200).

James Madison, having a sizable financial investment to safeguard, a political reputation to protect, and Virginia’s interests to defend, served as the leader of the forces opposing the Bank (Elkins & McKittrick, p. 229; McDonald, 1979, pp. 199-200). When the Senate sent the bank bill to the House, it was read on two separate occasions during which Madison made no objections to



the proposed bank. Working behind the scenes, Madison first sought to limit the Bank's charter to ten years so it would expire approximately at the same time the capital was to be relocated to the Potomac (McDonald, 1979, p. 200). Seeking to work out a compromise, "Madison approached the Pennsylvania delegation and offered unconditional southern support for the bank if only Pennsylvania would join with the South in insisting upon a ten instead of a twenty year charter" (Bowling, p. 235). During the political maneuvering between Madison and the Pennsylvania legislators, Madison threatened to attack the bank on constitutional grounds should the Pennsylvanians not agree to the proposed compromise (Bowling, p. 235; Elkins & McKittrick, p. 229; McDonald, p. 200). One historian described Pennsylvania's reaction to Madison's offer and threat: "The Pennsylvanians, however were obdurate; and besides, they distrusted the Virginians, fearing that in their eagerness to prepare the permanent site they would deny Philadelphia even its agreed-upon ten years" (McDonald, 1979, p. 200). Perhaps the Pennsylvanians were also aware that the supporters of the Bank "outnumbered its opponents by about two to one in the House and three to one in the Senate" (Elkins & McKittrick, p. 228).

*Hamilton's economic proposals for america: Madison's constitutional objections to phase two.*

And so the constitutional question was raised, not because of any grave constitutional concerns, but for political reasons (see Appendix J). Madison made good on his threat and attacked the bank bill on constitutional grounds in the House on Wednesday, February 2, 1791 (Benton, I, p. 274). After discussing both the advantages and disadvantages of banks, he observed that the Constitutional Convention had considered including the "power to grant charters of incorporation" as one of the enumerated powers, but that proposal had been "rejected" (Benton, I, p. 275). Having raised the constitutional issue, Madison then phrased the question to be examined: "Is the power of establishing an incorporated bank among the powers

vested by the constitution in the Legislature of the United States” (Benton, I, p. 275)? After reviewing the Constitution, Madison continued, he had been able to discover only three clauses “under which such a power could be pretended” (Benton, I, p. 275). They were: “[t]he power to lay and collect taxes,” “[t]he power to borrow money,” and “[t]he power to pass all laws necessary and proper to carry into execution those powers” (Benton, I, p. 275).

Subsequent to discussing the first two powers and argumentatively demonstrating how he didn’t think they applied to the proposed bank bill, Madison came to the Necessary and Proper Clause of the Constitution. It was here that Madison articulated the “Strict Construction Theory” of how the Constitution should be interpreted. First, Madison observed, the Constitution was a “grant of particular powers only” by “which the Federal Government is limited” (Benton, I, p. 275). Any interpretation “that destroys the very characteristic of the Government cannot be just” (Benton, I, p. 275). Furthermore, Madison noted, the general purposes of government “were limited and explained by the particular enumeration subjoined” (Benton, I, p. 275). Madison continued, “To understand these terms [necessary and proper] in any sense that would justify the power in question, would give to congress an unlimited power; would render nugatory the enumeration of particular powers; would supersede all the powers reserved to the State Governments” (Benton, I, p. 275). No interpretation of the meaning of necessary and proper “can be admitted, that would give an unlimited discretion to Congress. Its meaning must, according to the natural and obvious of the terms and the context, be limited to means necessary to the end” (Benton, I, p. 276). Madison continued his exposition:

The essential characteristic of the Government, as composed of limited and enumerated powers, would be destroyed, if, instead of direct and incidental means, any means could be used, which, in the language of the preamble to the bill, “might be conceived to be conducive to the successful conducting of the finances, or might be conceived to tend to give facility to the obtaining of loans.” (Benton, I, p. 276)

Since the bill in question neither levied taxes nor borrowed money, both of which were enumerated powers of the national government, there was nothing to which “necessary and proper” could be connected. Finally, Madison warned of the dangers of treading down the slippery path of implied powers: “The doctrine of implication is always a tender one. The danger of it has been felt in other Governments. The delicacy was felt in the adoption of our own; the danger may also be felt if we do not keep close to our chartered authorities” (Benton, I, p. 276).

One week later, on February 8, 1791, Madison summarized his position: “The power of granting charters is a great and important power, and ought not to be exercised unless we find ourselves expressly authorized to grant them” (Benton, I, p. 306). Regarding the “constructions of the constitution” by the bill’s advocates that rested on the necessary and proper clause, Madison declared that they went “to the subversion of every power whatever in the several States” (Benton, I, p. 307).

*Hamilton’s economic proposals for america: Madison’s constitutional objections analyzed according to his previous record.*

In rising to attack the bank bill as the self-proclaimed champion of strict construction, Madison contradicted his own previously consistent record of advocating for a broad interpretation focused on the doctrine of implied powers (e.g., the President’s power to remove cabinet officials, expanding the census, articulating the doctrine of implied powers regarding the Articles in 1781, advocating implied powers in constructing the meaning of the Constitution in Federalist No. 44, and by carefully preserving the doctrine of implied powers in framing the Tenth Amendment). Even more awkwardly (in regards to the timing of his turnaround), he had only recently supported the doctrine of implied powers regarding the power of the president to

remove cabinet officials. This occurred during congressional debates centered on creating the executive departments of the new government in 1789. The only method of removal provided by the Constitution was impeachment. Madison “countered with the commonsense argument that the power to appoint inherently carried with it the power of removal” (McDonald, 1979, p. 130). Eventually congressional legislation creating the executive departments granted exclusive removal power to the President, largely on the strength of Madison’s arguments that the power to remove was implied in the expressly-stated constitutional power to appoint cabinet officials.<sup>31</sup>

As will be further shown, Madison had a long and consistent history of supporting the doctrine of implied powers before he uttered his remarkable statements in Congress challenging the constitutionality of the proposed First Bank of the United States. Even more recently than the issue of the President’s removal power over cabinet officials, Madison had been a leading proponent of expanding the census beyond the constitutional requirements. Article I, § 2 of the Constitution required that an enumeration be made every ten years of the “whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.” On January 25, 1790, Madison proposed that the census bill be “extended so as to embrace some other objects besides the bare enumeration of the inhabitants” in order to enable legislators “to adapt the public measures to the particular circumstances of the community” (Hobson & Rutland, 13, p. 8; hereafter cited as PJM). The next day Madison presented a “particular schedule” to be attached to the census bill that “included categories for landowners, merchants, manufacturers, ‘artificers,’ sailors, and a variety of tradesmen” (PJM, 13, p. 9, n. 1). On February 2, 1790, Madison responded to objections that his proposal for the census was “impracticable” by declaring there would be “more difficulty ... taking the census in the way required by the constitution, and which we are obliged to perform” than there would be

with the added “distinctions contemplated in the bill” because the additional information would allow legislators “to accommodate our laws to the real situation of our constituents” (PJM, 13, p. 15).

Madison had first articulated a loose construction of the Articles of Confederation that focused upon the doctrine of implied powers on March 12, 1781, in discussing a proposal to amend the Articles. Madison began by citing what he regarded to be a pertinent section of the Articles:

Whereas it is stipulated and declared in the 13th. [sic] Article of the Confederation “that every State shall abide by the determinations of the United States in Congress assembled on all questions which by this Confederation are submitted to them. And that the Articles of this Confederation shall be inviolably observed by every State.” (Hutchinson & Rachal, III, p. 17; hereafter cited as PJM)

Madison then continued by using the phrase “implied power” for the first time in his career, according to Hutchinson & Rachal (PJM, III, p. 19, n. 2):

[B]y which Arti[c]le [sic] a general and implied power is vested in the United States in Congress assembled to enforce and carry into effect all the Articles of the said Confederation against any of the States which shall refuse or neglect to abide by such determinations, or shall otherwise violate any of the said Articles, but no determinate and particular provision is made for that purpose. (PJM, III, pp. 17-18)

Madison reiterated his thinking regarding implied powers in a letter to Thomas Jefferson on April 16, 1781:

If they [a state or states] should refuse [to comply with a measure passed by Congress], Congress will be in a worse situation than at present: for as the confederation now stands, and according to the nature even of alliances much less intimate, there is an implied right of coer[c]io[n] [sic] against the delinquent party, and the exercise of it by Congress whenever a palpable necessity occurs will probably be acquiesced in. (PJM, III, p. 72)

Even more fundamentally, in a constitutional sense, Madison enshrined the doctrine of implied powers in *The Federalist*. Madison devoted Numbers 41-44 of *The Federalist* to a

discussion of “The Powers Conferred by the Constitution” (Federalist No. 41, p. 223). He discerned six classes “of provisions in favor of the federal authority” which he discussed in detail in Nos. 41-44 (Federalist No. 44, p. 248). The Necessary and Proper Clause of the Constitution belonged to the sixth class, according to Madison’s delineation of federal power derived from the Constitution. As Madison expressed it, “Without the *substance* of this power, the whole Constitution would be a dead letter” (Federalist No. 44, p. 252). Regarding the possibility of a strict construction, Madison observed:

They [the members of the Constitutional Convention] might have copied the second article of the existing Confederation, which would have prohibited the exercise of any power not *expressly* delegated; they might have attempted a positive enumeration of the powers comprehended under the general terms ‘necessary and proper’; ... (Federalist No. 44, p. 252).

Madison then proceeded to lay out the consequences of such actions, had the Framers been so unwise to adopt them. Regarding the possibility of including the phrase “expressly delegated,” Madison spelled out the possible repercussions in detail:

[I]t is evident that the new Congress would be continually exposed, as their predecessors have been, to the alternative of construing the term “*expressly*” with so much rigor as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction. (Federalist No. 44, p. 252)

At this point, Madison introduced his understanding of implied powers derived from his own (and others’) prior experience as a congressman:

It would be easy to show, if it were necessary, that no important power delegated by the Articles of Confederation has been or can be executed by Congress, without recurring more or less to the doctrine of *construction* or *implication*. (Federalist No. 44, p. 252)

And now, Madison applied implied powers to the government proposed by the Constitution:

As the powers delegated under the new system are more extensive, the government which is to administer it would find itself still more distressed with the alternative of betraying the public interests by doing nothing, or of

violating the Constitution by exercising powers indispensably necessary and proper, but, at the same time, not *expressly* granted. (Federalist No. 44, p. 252)

As for the notion that powers needed to be explicitly enumerated in order to be exercised by the federal government, Madison showed the ridiculousness of such an idea by observing:

Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates; accommodated too not only to the existing state of things, but to all the possible changes which futurity may produce... (Federalist No. 44, pp. 252-253)

Madison then concluded with the nucleus of what would become the classical interpretation of implied powers when subsequently articulated by Alexander Hamilton and Chief Justice John Marshall:

No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included. (Federalist No. 44, p. 253)

Even more fundamentally, in a constitutional sense, Madison had carefully preserved the doctrine of implied powers through his crafting of the Tenth Amendment. He purposely did not include the term “expressly” in the Tenth Amendment.<sup>32</sup> Otherwise, the amendment would have read, “The powers not *expressly* delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people” (Emphasis added).

*Hamilton’s economic proposals for america: Congressional reactions to madison’s constitutional objections.*

If Madison had thought his stature as a member of the Constitutional Convention and as a leading expositor of the document would help sway fellow legislators to his point of view regarding the bank bill, he was in for a rude jolt. Massachusetts Representative Fisher Ames first

arose in response to Madison. Given the fact that the bill had undergone two readings in the House without any objection from Madison, Ames posed the question, “Why, then, did he suffer the bill to pass the committee in silence” (Benton, I, p. 279)? Ames remarked that it was “rather late in the day to adopt [Madison’s doctrine of strict construction] as a principle of conduct” since “we have scarcely made a law in which we have not exercised our discretion with regard to the true intent of the constitution” (Benton, I, p. 279). Ames then proceeded to provide an example of Congress having made “laws conformably to the powers plainly implied, though not expressed in the frame of Government” (Benton, I, p. 279):

We may regulate trade; therefore we have taxed ships, erected light-houses, made laws to govern seamen, &c., because we say that they are the incidents to that power. The most familiar and undisputed acts of legislation will show that we have adopted it as a safe rule of action, to legislate beyond the letter of the constitution. (Benton, I, p. 279)

Of course, Madison had himself favored such legislation. Regarding the Necessary and Proper Clause, Ames observed that “[h]e did not pretend that it gives any new powers;” instead the clause “establishes the doctrine of implied powers” (Benton, I, p. 282). According to Ames, “That construction may be maintained to be a safe one which promotes the good of society, and the ends for which the Government was adopted, without impairing the rights of any man or the powers of any State” (Benton, I, p. 280).

Next, Theodore Sedgwick, also of Massachusetts, rose in response to Madison. After remarking that he had not thought that either the constitutionality or the usefulness of a national bank “was doubted by any intelligent man in America,” Sedgwick raised the matter of Madison’s consistency regarding the doctrine of implied powers (Benton, I, p. 282):

I do not wish to deprive that member of the honor of consistency; but I well remember the time when the energy of his [Madison’s] reasoning impressed on the minds of the majority of this House a conviction that the power of removal from office, holden at pleasure, was, by construction and



implication, vested by the constitution in the President; for there could be no pretence that it is expressly granted to him. (Benton, I, p. 282)

After connecting the bank's purpose as a means to accomplish constitutionally "enumerated powers," Sedgwick stated the separate purposes of constitutions and codes of law:

[T]he constitution had expressly declared the ends of legislation; but in almost every instance had left the means to the honest and sober discretion of the Legislature. From the nature of things this must ever be the case; for otherwise the constitution must contain not only all the necessary laws under the existing circumstances of the community, but also a code so extensive as to adapt itself to all future possible contingencies. (Benton, I, p. 283)

One wonders how Madison felt when hearing the very arguments he had advanced in Federalist No. 44 being used against him (see Federalist No. 44, pp. 252-253). Of course, at this particular juncture the authors of the various articles contained in *The Federalist* remained unknown (Elkins & McKittrick, p. 231). The irony must have been heightened even more for Madison when Representative Elias Boudinot of New Jersey rose to speak and began reading extensive excerpts from Madison's Federalist No. 44 to refute Madison's changed position, most of which were "too long to be inserted" into the official record (Benton, I, p. 290). At the time, however, speculation erroneously centered on Alexander Hamilton as the author of Federalist No. 44.<sup>33</sup> The excerpts that were "too long to be inserted" into the record included three entire pages of Federalist No. 44 that included the most powerful argument offered by Madison for implied powers under the Necessary and Proper Clause, namely:

No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included. (Federalist No. 44, p. 253; Benton, I, p. 290)

Not only did Madison hear his own arguments being persuasively used against him, he also had his "authority to pontificate about the intentions of the framers of the Constitution" questioned by two of his colleagues (McDonald, 1979, p. 201). Elbridge Gerry of

Massachusetts, himself a member of the Constitutional Convention, after observing that Madison had “endeavored to support his interpretation of the constitution by the sense of the Federal Convention,” asked how such an action was “to be obtained” (Benton, I, p. 304)? Gerry further asked, “[A]re we to depend on the memory of the gentleman for a history of their debates, and from thence to collect their sense” (Benton, I, p. 304)? He concluded:

This would be improper, because the memories of different gentlemen would probably vary, as they had already done, with respect to those facts; and if not, the opinions of the individual members who debated are not to be considered as the opinions of the Convention. (Benton, I, p. 304)

Gerry, as a member of the same convention that Madison attended, flatly contradicted Madison’s prior assertion that the Framers had rejected a measure for establishing a national bank.

[N]o motion was made in that Convention, and therefore none could be rejected for establishing a National Bank; and the measure which the gentleman has referred to was a proposition merely to enable Congress to erect commercial corporations, which was, and always ought to be, negatived. (Benton, I, p. 304)

Gerry also questioned Madison’s consistency regarding the doctrine of implied powers, citing Madison’s persuasive advocacy for giving “the President the power of removing [cabinet] officers” as well as Madison’s advocacy for an interpretive rule whereby the President and Congress determined “when and where they should hold their next session, although the constitution provides that this power should rest solely in the two Houses” (Benton, I, p. 303).

Representative John Vining of Delaware next rose to question Madison’s claim to know the sense of the Constitutional Convention regarding the proposed bank. Suggesting that Madison’s opinion was unique among the congressional members who had attended the Constitutional Convention, Vining remarked that Madison’s opinion regarding the constitutionality of the bank bill was “different from that of his contemporaries” (Benton, I, p. 305). Continuing, Vining noted that “a similar objection had not been started by those gentlemen of the Senate, who had

been members of the Convention” (Benton, I, p. 305). Vining was referring to the eleven members of the Senate who had been delegates to the Constitutional Convention in Philadelphia, none of whom entertained any constitutional doubts about the bank bill.

The Senate had approved the bank bill by a three-to-one margin before sending it to the House (Elkins & McKittrick, p. 228). On Tuesday, February 8, 1791, following a motion by Madison to “move for the previous question,” the House also approved the bank bill, 39 to 20 (Benton, I, p. 308). According to one historian, “Nineteen of the twenty dissenting votes were from the South, twelve of them from the two states on the Potomac” (McDonald, 1979, p. 201). Not all southern legislators opposed the bank, but the vast majority of opposition to the bank came from southern members of Congress.

Southern states, engaged primarily in agricultural production, were generally suspicious of banks, a suspicion that was described as a “kind of country-party fundamentalism with regard to banks” (Elkins & McKittrick, p. 229). According to Michael Stone, a representative from Maryland, “This Bank will swallow up the State banks; it will raise in this country a moneyed interest at the devotion of Government; it may bribe both States and individuals” (Benton, I, p. 295). Stone noted that the bill would all “a few stockholders [to] institute banks in particular States, to their aggrandizement and the oppression of others” (Benton, I, p. 295). Representative James Jackson of Georgia alluded to the division in the House regarding the proposed bank that was represented by a “geographical line” and asked, “[W]here is the gentleman to the southward that is for it [the bank]” (Benton, I, p. 286)? As one historian noted, “The divisions on the bank bill in the House and Senate were more sectional than on any other votes in the First Congress” (Bowling, p. 233). Besides the suspicion of banks, another reason existed to explain regional opposition to the bank. Professor McDonald cited an analysis of the opposition furnished by a

contemporary, Representative Benjamin Bourne of Rhode Island, who wrote in a letter: “But I am persuaded we would not have heard anything of either [the unconstitutionality and the inexpedience of the bank] did not the Gentleman from the Southward view the measure, as adverse to the removal of Congress, ten years hence” (McDonald, 1979, pp. 201-202).

*Hamilton’s economic proposals for america: Constitutional objections to phase two by randolph and jefferson.*

While the House was still debating the measure, President Washington asked two fellow Virginians who were members of his cabinet for formal opinions regarding the bill’s constitutionality because Madison had raised constitutional objections to the bank bill. Edmund Randolph, Attorney General, “endorsed Madison’s argument that the bill was unconstitutional” since, in his opinion, “there was no way of construing the incorporation of a bank from the Constitution’s enumerated powers” (McDonald, 1979, p. 202; Elkins & McKittrick, p. 232). Randolph’s opinion was described as “rather rambling” (Elkins & McKittrick, p. 232). The other Virginian asked by Washington to provide a formal opinion was his Secretary of State, Thomas Jefferson. Jefferson, too, found the bank bill to be unconstitutional in an opinion described as a “shorter and less persuasive version of Madison’s arguments” (McDonald, 1979, p. 202).

Jefferson began by citing the Tenth Amendment, which he incorrectly identified.

I consider the foundation of the Constitution as laid on this ground that ‘all powers not delegated to the U.S. by the Constitution, not [sic] prohibited by it to the states, are reserved to the States or to the people’ (XIIth. Amendmt.). To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless feild [sic] of power, no longer susceptible of any definition. (Boyd & Lester, 19, p. 270; hereafter cited as PTJ)

Continuing, Jefferson opined, “The incorporation of a bank, and other powers assumed by this bill have not, in my opinion, been delegated to the U.S. by the Constitution” (PTJ, 19, p. 276).

Elaborating his remarks, Jefferson noted that “[t]hey are not among the powers specially

enumerated” nor were they “within either of the general phrases” (PTJ, 19, pp. 276, 277). The first general phrase to which Jefferson referred dealt with the taxing power of the United States. The other general phrase was the Necessary and Proper Clause. In interpreting the term “necessary,” Jefferson provided what would become the classic definition, taken up by subsequent strict constructionists, in which he interpreted the term to mean “absolutely indispensable” for achieving an enumerated power.

The second general phrase is ‘to make all laws *necessary* and proper for carrying into execution the enumerated powers.’ [sic] But they can all be carried into execution without a bank. A bank therefore is not *necessary*, and consequently not authorized by this phrase. (Emphasis Jefferson) (PTJ, 19, p. 278)

Jefferson concluded his opinion by noting that the presidential veto was intended to be a “shield provided by the constitution to protect against the invasions of the legislature” (PTJ, 19, p. 279). According to Jefferson, the power to charter a bank was “a right remaining exclusively with the states and [was] consequently one of those intended by the constitution to be placed under his [the President’s] protection” (PTJ, 19, p. 280).

Described as “seriously upset by the raising of the constitutional issue” and “genuinely perplexed” by the opinions of trusted advisors questioning the bill’s legality, President Washington, in a letter written February 16, 1791, formally asked Hamilton for his opinion regarding the constitutionality of the bank bill so that he could be “fully possessed of the Arguments *for* and *against* the measure” before he determined whether to veto or to sign the proposed “Act to incorporate the Subscribers to the Bank of the United States” (Emphasis in original) (McDonald, 1979, p. 202; Elkins & McKittrick, p. 232; PAH, 8, p. 50). Washington also provided Hamilton with copies of Randolph’s and Jefferson’s opinions in order that Hamilton “may know the points on which the Secretary of State and the Attorney-General

dispute the constitutionality of the Act” and thus be provided “an opportunity of examining & answering the objections contained in the enclosed papers” (PAH, 8, p. 50). At the same time, Washington requested Madison to prepare a veto message that could be used in the event it proved necessary (Elkins & McKittrick, p. 232; McDonald, 1979, p. 202).

*Hamilton’s economic proposals for america: Constitutional opinion by hamilton regarding phase two.*

Hamilton submitted his opinion to President Washington on February 23, 1791 (PAH, 8, pp. 62-63). Described as possessing “profound legal gifts,” his opinion was characterized as “another of Hamilton’s great disputations, quite in the line of *The Farmer Refuted* and *The Federalist*” (McDonald, 1979, p. 205; Elkins & McKittrick, p. 232). Another historian characterized Hamilton’s legal reasoning as “a brilliant treatise” and as a “masterful brief” (Leibiger, p. 135). Even one of Madison’s principal biographers described Hamilton’s opinion as a “brilliant and persuasive treatise” (Ketcham, p. 321). Two historians of the period rendered this account of Hamilton’s constitutional analysis:

Hamilton’s opinion was more thorough and comprehensive than the arguments by the bank’s supporters in Congress, and was better thought through on constitutional as well as technical grounds than any of the adverse opinions. He had the advantage of having the others laid out before him; he also knew more about the subject than anyone else. (Elkins & McKittrick, p. 232)

By his opinion Hamilton expounded the doctrine of implied powers through a broad construction of the Constitution’s meaning that was subsequently used “by Marshall, Webster, Lincoln, the two Roosevelts, and other advocates of federal power” (Ketcham, p. 321).

In introducing his opinion, Hamilton noted that his primary motivating factor in rendering a constitutional opinion lay not with his authorship of the bank bill (although such “personal considerations alone ... would be sufficient”), but instead arose from his “firm

persuasion, that principles of construction like those espoused by the Secretary of State and the Attorney General would be fatal to the just & indispensable authority of the United States”

(PAH, 8, p. 97). Hamilton’s opening point focused on sovereignty as he stated a self-evident proposition:

[E]very power vested in a Government is in its nature *sovereign*, and includes by *force* of the *term*, a right to employ all the *means* requisite, and fairly *applicable* to the attainment of the *ends* of such power; and which are not precluded by restrictions & exceptions specified in the constitution; nor not immoral, or not contrary to the essential ends of political society. (Emphasis in original, here and in following Hamilton quotations) (PAH, 8, p. 98)

In order to disprove this self-evident proposition, a person would be required “to shew that a rule which in the general system of things is essential to the preservation of the social order is inapplicable to the United States” (PAH, 8, p. 98). The fact that sovereignty in the United States was divided between the state and federal governments did not alter the nature of sovereignty. It meant only “that each has sovereign power as to *certain things*, and not as to *other things*” (Emphasis in original, this and following quotations) (PAH, 8, p. 98). For a person to deny that the national government had sovereign powers just because its powers were limited would require that such an individual also deny that state governments had sovereign powers since their powers were limited as well. The absurdity of such reasoning was pointed out by Hamilton: “And thus the United States would furnish the singular spectacle of a *political society* without *sovereignty*, or of a people *governed* without *government*” (PAH, 8, p. 98).

Discussing whether or not the United States had the power to “erect a corporation,” Hamilton pointed out that it was “unquestionably incident to *sovereign power* to erect corporations, and consequently to *that* of the United States, in *relation to the objects* intrusted to the management of the government” (PAH, 8, p. 99). Noting that the opponents of the bank bill

cited the Tenth Amendment as foundational to their argument against the power of the government to erect corporations because it is not a power that is “enumerated in the constitution,” Hamilton observed that the “main proposition” of the Tenth Amendment was “not to be questioned” since it was “nothing more than a consequence of this republican maxim, that all government is a delegation of power” (PAH, 8, pp. 99-100). However, Hamilton continued, “It is not denied, that there are *implied*, as well as *express* powers, and that the former are as effectually delegated as the latter” (PAH, 8, p. 100). After discussing the power of the national government to provide for governments in newly acquired territories as an example of an implied power, Hamilton reiterated his former point, that “implied powers are to be considered as delegated equally with express ones” (PAH, 8, p. 100). Furthermore, implied powers were the means “of carrying into execution ... any of the specified powers” (PAH, 8, p. 100). Therefore, the only legitimate question regarding implied powers was “whether the mean to be employed, or in this instance the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government” (PAH, 8, p. 100). For example, Congress could not establish a corporation to superintend the police of Philadelphia because they had no constitutional authorization “to *regulate* the *police* of that city” (PAH, 8, p. 100). However, Hamilton continued, Congress could establish a corporation for the purpose of collecting taxes or for regulating foreign and/or interstate commerce (PAH, 8, p. 100). In Hamilton’s view, the opponents of the bank bill mistakenly argued as if the establishment of a corporation were an end instead of merely a means to a legitimate constitutional end. Such reasoning led them to “erroneous conclusions” regarding the constitutionality of the bank bill (PAH, 8, p. 101).

Hamilton next directed attention to Jefferson’s narrow interpretation of the Necessary and Proper Clause. Jefferson had argued that the clause was to be interpreted as meaning absolutely



necessary for the accomplishment of the desired end, or as Hamilton paraphrased Jefferson's reasoning, the clause restricted congressional power "to those [means], without which the grant of the power would be nugatory" (PAH, 8, p. 101). According to Hamilton, such a view was nonsense: "It is essential to the being of the National government, that so erroneous a conception of the meaning of the word *necessary*, should be exploded" (PAH, 8, p. 102). Hamilton continued by offering both a grammatically correct and a common-sense meaning of "necessary":

It is certain, that neither the grammatical, nor popular sense of the term requires that construction. According to both, *necessary* often means no more than *needful, requisite, incidental, useful, or conducive to*. It is a common mode of expression to say, that it is *necessary* for a government or a person to do this or that thing, when nothing more is intended or understood, than that the interests of the government or person require, or will be promoted, by the doing of this or that thing. (PAH, 8, p. 102)

Jefferson's narrow interpretation also violated the intentions of the Framers. According to Hamilton:

The whole turn of the clause containing it, indicates, that it was the intent of the convention, by that clause to give a liberal latitude to the exercise of the specified powers. The expressions have peculiar comprehensiveness. They are – "to make *all laws*, necessary & proper for *carrying into execution* the foregoing powers & all *other powers* vested by the constitution in the *government* of the United States, or in any *department* or *officer* thereof." (PAH, 8, pp. 102-103)

Thus Jefferson's narrow interpretation of "necessary" not only "depart[ed] from its obvious & popular sense," but also gave "it a *restrictive* operation" that was "never before entertained" (PAH, 8, p. 103). Jefferson's argument interpreted necessary "as if the word *absolutely* or *indispensably* had been prefixed to it (PAH, 8, p. 103). Finally, Jefferson's interpretation substituted a false test of constitutionality.

The *degree* in which a measure is necessary, can never be a test of the *legal* right to adopt it. That must ever be a matter of opinion; and can only be a

test of expediency. The *relation* between the *measure* and the *end*, between the *nature of the mean* employed towards the execution of a power and the object of that power, must be the criterion of constitutionality not the more or less of *necessity* or *utility*. (PAH, 8, p. 104)

To show the paralyzing effect upon government that would be caused by Jefferson's position, Hamilton examined several practical examples of legislation enacted under the new Constitution. He began by declaring, "The practice of the government is against the rule of construction advocated by the Secretary of State" (PAH, 8, p. 104). Congress had recently passed an "act concerning light houses, beacons, buoys & public piers." According to Hamilton:

This doubtless must be referred to the power of regulating trade, and is fairly relative to it. But it cannot be affirmed, that the exercise of that power, in this instance, was strictly necessary; or that the power itself would be *nugatory* without that of regulating establishments of this nature. (PAH, 8, p. 104)

Similarly Hamilton applied Jefferson's reasoning to state governments that had incorporated both banks and towns within their borders. Hamilton pointed out "that there is no *express* power in any State constitution to erect corporations" (PAH, 8, p. 103). Hamilton's final illustration focused on the act "which declares the power of the President to remove officers at pleasure" (PAH, 8, p. 106). Reiterating his point once more, Hamilton declared, It is not only agreed, on all hands, that the exercise of constructive powers is indispensable, but every act which has been passed is more or less an exemplification of it" (PAH, 8, p. 106). And, Hamilton cautioned, the Necessary and Proper Clause did not act to provide the government with "any new or independent power" (PAH, 8, p. 106). The Necessary and Proper Clause does, however, provide

an explicit sanction to the doctrine of *implied* powers, and is equivalent to an admission of the proposition, that the government, *as to its specified powers and objects*, has plenary & sovereign authority, in some cases paramount to that of the States, in others coordinate with it. For such is the plain import of the declaration, that it may pass *all laws* necessary & proper to carry into execution those powers. (PAH, 8, p. 106).

According to Hamilton, difficulties regarding the Necessary and Proper Clause arose from federalism and were “inherent in the nature of the foederal [sic] constitution” (PAH, 8, p. 107).

The consequence ... is, that there will be cases clearly within the power of the National Government; others clearly without its power; and a third class, which will leave room for controversy & difference of opinion, & concerning which a reasonable latitude of judgment must be allowed.  
(PAH, 8, p. 107)

Furthermore, the doctrine of implied powers articulated by Hamilton did possess “a criterion of what is constitutional, and of what is not so. This criterion is the *end* to which the measure relates as a *mean*” (PAH, 8, p. 107). Hamilton then offered what became the classical benchmark of constitutionality in the hands of Chief Justice John Marshall and his successors.<sup>34</sup>

If the end be clearly comprehended within any of the specified powers, & if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution – it may safely be deemed to come within the compass of the national authority.... Does the proposed measure abridge a preexisting right of any State, or of any individual? If it does not, there is a strong presumption in favour of its constitutionality...  
(PAH, 8, p. 107)

*Hamilton's economic proposals for america: Resolution of the constitutional conflict by president washington and its aftermath.*

On Friday, February 25, 1791, President Washington “signed the bank bill into law” (McDonald, 1979, p. 210). He hadn’t needed Madison’s veto message, which was fortunate for the country’s financial condition. The bank represented the capstone of Hamilton’s plan “to use his administration of the public finances as an instrument for forging the American people into a prosperous, happy, and respected nation” (McDonald, 1979, p. 117).

To complete the contextual picture surrounding the constitutional questions raised by the interplay of the Tenth Amendment and the Necessary & Proper Clause, it would be instructive to examine the effects of Hamilton’s program upon American economic prosperity. American exports rose from \$20 million in 1790 to over \$61 million by 1811 while imports increased from

\$23 million to \$53 million during the same period (Brogan, p. 256). The New York Stock Exchange was founded in 1792 while “the price of farm products went up by between 50 and 100 per cent between 1790 and 1814 – very satisfactory for a nation still overwhelmingly committed to agriculture” (Brogan, p. 256). Work also began on improving the difficult problem of transportation in colonial America. “Beginning with the Lancaster Road in Pennsylvania in 1792, turnpikes were built everywhere to supplement the rivers” (Brogan, p. 256). Finally, and somewhat ironically for Jefferson who had raised constitutional objections to Hamilton’s financial program, the Hamiltonian financial system enabled President Jefferson to accomplish his “greatest achievement,” the Louisiana Purchase, that “was made possible only by foreign loans, which would not have been forthcoming if Hamilton had not established the credit of the United States so solidly” (Brogan, p. 270). Henry Cabot Lodge, a noted historian, editor, and politician, described Hamilton’s influence upon America.

Hamilton is one of the statesmen of creative minds who represent great ideas. It is for this reason that he left the deep mark of his personal influence upon our history. His principles of finance, of foreign affairs, of political economy, and of the powers and duties of government under the Constitution, may be found on every page of our history... (Lodge, p. 278)

Lodge, believing that one mark of a person’s greatness could be found in the writings of ones opponents, cited an evaluation of Hamilton by a judge, Ambrose Spencer, “who had many conflicts with Hamilton” (Lodge, p. 273). In Spencer’s words, Hamilton “was the greatest man this country ever produced” (Lodge, p. 273). He continued, “It was he, more than any other man, who thought out the Constitution of the United States and the details of the government of the Union” (Lodge, pp. 273-274).

***The kentucky & virginia resolutions and their subsequent influence.***

*Overview.*

The American political fault line between state rights and federal supremacy was next revealed during the latter years of the eighteenth century and represented the third constitutional issue raised during the early years of American government under the Constitution that preceded Supreme Court involvement in refereeing the conflict (For the second, which also involved Madison, see Appendix K). Actions taken by Jefferson and Madison in response to the passage of congressional legislation favored by President Adams, popularly called the Alien and Sedition Acts, on July 14, 1798, raised the question of procedural response to congressional acts thought to be unconstitutional. The reaction of Madison and Jefferson to legislation they vehemently opposed also resurrected the spectre of “States as Sovereign Entities” and laid the theoretical groundwork for subsequent actions taken by southern states during the Nullification Controversy and during the secession from the Union followed by the formation of the Confederacy that precipitated the deadliest conflict in American history, the Civil War.

Jefferson and Madison secretly drafted the Kentucky and Virginia Resolutions that were approved by the state legislatures of Kentucky and Virginia on November 13th and December 24th respectively, 1798. These resolutions were the first to declare that the states had the right to determine whether a law of Congress was constitutional. Both resolutions declared that the Alien and Sedition Acts violated the Constitution by giving the President judicial powers that denied aliens the right to jury trial. Before calling upon other states to join in condemning the acts as unconstitutional, the resolutions also claimed that the Alien and Sedition Acts violated freedom of speech and of the press.<sup>35</sup> Evidence that a person’s position respective to the major fault line regarding political sovereignty determines how one will interpret the Constitution is provided by the following historical interpretation of the resolutions:

Both sets of resolutions were argued on a strict-construction basis and a view of the Constitution as a compact among the several states, a compact

that had been violated by recently enacted federal legislation. They asserted ... that the Constitution to which the contracting states had assented delegated certain powers to the federal government, specifically enumerated, all others not so delegated being reserved to the states; (Elkins and McKittrick, pp. 719-720)

In addition, besides challenging the concept of judicial review, both sets of resolutions questioned the preeminence of the federal government in making constitutional determinations. “Historically,” according to two historians, “the immediate context of the Resolutions came to be overshadowed by implications that far outlived the occasion which inspired them and for which they were designed” (Elkins & McKittrick, p. 719).

### *Judicial review.*

Judicial review, a concept most Americans take for granted today, was not definitively established in a judicial sense until Chief Justice John Marshall issued his classic statement in *Marbury v. Madison* (1803), “It is emphatically the province and duty of the judicial department to say what the law is” (5 U.S. 137, 177).<sup>36</sup> Actually, the foregoing statement is used as a sort of shorthand tool to refer to Marshall’s elaboration of judicial review in *Marbury*. The oft-quoted statement merely served as the introduction to Marshall’s step-by-step discussion of judicial review. His next statement of importance for establishing judicial review occurred two paragraphs later when he said, “If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply” (5 U.S. 137, 178). Four paragraphs later, Marshall used a statement from the Constitution to ask and answer a rhetorical question.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the

constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained. (5 U.S. 137, 178-179)

Marshall next noted that not only the legislature, but also the courts were to act in a constitutional manner. “[I]t is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature” (Emphasis in original) (5 U.S. 137, 179-180). Marshall then concluded:

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument. (Emphasis in original) (5 U.S. 137, 180)

In discussing the principle of written constitutions, Marshall continued a line of reasoning stated by Hamilton in *The Federalist* whereby Hamilton derived judicial review from the theory of governments limited by constitutions. Hamilton had written:

In the first place, there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution... I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of convention, but from the general theory of a limited Constitution; and as far as it is true is equally applicable to most if not to all the State governments. (Federalist No. 81, p. 450)

Notwithstanding its importance, Marshall’s enshrinement of judicial review as a cornerstone of American government did not occur until *after* the Kentucky and Virginia Resolutions.

However, before the ruling in *Marbury*, judicial review as the procedural response to constitutional questions was neither an unknown nor an unarticulated concept in the United States. Prior to the Supreme Court’s ruling and previous to the Kentucky & Virginia Resolutions, judicial review had been clearly articulated, both in public and in closed

governmental session (attended and recorded by Madison), as the proper mechanism for addressing the constitutionality of congressional acts. The historical record of such discussions includes state court decisions that invalidated state legislative acts on constitutional grounds, the Constitutional Convention, *The Federalist Papers*, the state ratifying conventions, the Judiciary Act of 1789, federal circuit court decisions that voided state and federal legislation, Supreme Court decisions that invalidated state legislative actions, and a Supreme Court decision that ruled on the constitutionality of a congressional act.

During the 1780s when the country operated under the Articles of Confederation, a period immediately prior to the Constitutional Convention, state high courts struck down legislative acts deemed to violate state constitutions in New Jersey, Virginia, Connecticut, Rhode Island, and North Carolina. In *Holmes v. Walton* (1780), the New Jersey State Supreme Court struck down a state statute requiring the use of six jurors, instead of the traditional twelve, for certain cases (Gerber, p. 15, n. 1).<sup>37</sup> In 1782, the Virginia Court of Appeals, the state's highest court, ruled on the constitutionality of a Virginia statute that had transferred the pardon power from the executive to the legislature (*Commonwealth v. Caton*, 8 Va {4 Call} 5). Two future delegates to the Constitutional Convention served as members of the tribunal adjudicating the case – John Blair and George Wythe (Beard, pp. 18 & 49). In the *Symsbury Case* (1785) the Connecticut high court invalidated a state act that had granted land belonging to the community of Symsbury to the town of New Hartford, ruling that the legislature's act "could not legally operate to curtail the land before granted to the proprietors of the town of Symsbury, without their consent" (1 Kirby 444, 447). In *Trevett v. Weeden* (1786), the Rhode Island high court invalidated a state statute requiring merchants to accept paper money as a form of legal payment. Besides empowering the constabulary to arrest merchants refusing to accept paper money, the act



also denied a jury trial to defendants.<sup>38</sup> The final case, *Bayard v. Singleton*, 1 N.C. 5 (1787), involved the confiscation of property belonging to British loyalists by North Carolina during the Revolution. The state high court struck down a state law requiring judges to dismiss any action brought by individuals attempting to recover such confiscated property, ruling that such individuals were entitled to a jury trial to determine the merits of claims (1 N.C. 5, 7). One of the attorneys in that case, William R. Davie, who had “served audaciously” in the Revolutionary War as a cavalry officer, attended the Constitutional Convention as a delegate from North Carolina (Rossiter, p. 128; 1 N.C. 5, 10).

Although not discussed publicly, the Framers had fully discussed the concept of judicial review during the Constitutional Convention (see Appendix L). Besides occurring in Madison’s presence, the discussions were recorded by him in his notes of the proceedings. Additionally, Madison served as an active participant in some of the discussions. Madison’s initial proposal for a “council of revision” (see Appendix L) “was a stronger limit on the Congress than either the executive veto or judicial review” (Wills, 1981/2001, p. 152). At the Convention, Madison “was earnestly promoting a much stronger role for the Supreme Court [stronger than simply that of judicial review] at that time. He wanted it to join with the executive in vetoing congressional legislation” (Wills, 1981/2001, p. 151; see also Appendix L). According to Wills, “The fact that the Convention expressly rejected the revisionary council, but did not exclude the weaker scheme of judicial review, seems to indicate that the framers took the latter as given in the draft already on the table” (Wills, 1981/2001, p. 152). That the Framers assumed the existence of judicial review is verified through an examination of remarks made at the Convention (see Appendix L). The record of the debates clearly indicates both Madison’s awareness and

acceptance of judicial review as a check (although a weaker check than his original proposal) upon unconstitutional legislation.<sup>39</sup>

According to one expert in constitutional law, Hamilton offered the “definitive justification of judicial review” in *Federalist No. 78* (Hall, 1992, p. 359).<sup>40</sup> First, Hamilton established the maxim of judicial review.

No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves. (Federalist No. 78, p. 435)

Then, Hamilton framed the concept:

It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. (Emphasis in original) (Federalist No. 78, p 435)

Next, Hamilton articulated specific arguments and details in favor of judicial review:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. (Federalist No. 78, p 435)

And then Hamilton provided the solution regarding conflicts between legislation and the Constitution:

If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred to the statute, the intention of the people to the intention of their agents. (Federalist No. 78, p 435)

According to a notable historian, a member of both the American Academy of Arts & Sciences and the American Academy of Arts & Letters, Hamilton was responding to the argument put forth by Robert Yates in his “Letters of Brutus”, “that judicial *review* would

amount to judicial *supremacy*” (Emphasis in original) (Yates, quoted in Wills, 1981/2001, p. 130). According to Wills, Hamilton argued for legislative supremacy, that not only were legislative supremacy and judicial review “compatible, but that judicial review *demand*s a theory of legislative supremacy – in the constitution-making act – as its necessary justification” (Emphasis in original) (Wills, 1981/2001, p. 135). Far from being “at odds with legislative supremacy,” judicial review depended on it (Wills, 1981/2001, p. 135). Without the recognition of legislative supremacy, “judicial review would make no sense at all” (Wills, 1981/2001, p. 135). In support of his contention, Wills then pointed to Hamilton’s own words (Wills, 1981/2001, p. 135):

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. (Federalist No. 78, pp. 435-436)

Thus the supreme legislative authority would be the actions taken by the people to approve and adopt the Constitution. As Wills explained, “Over and over in this paper Hamilton is stressing one thing – legislative supremacy, the supremacy of the more democratic ratifying conventions over indirect representation by majority vote in the Congress” (Wills, 1981/2001, p. 134).

Legislative supremacy proved to be the cornerstone upon which was built the supremacy of the Constitution for American government. Summarizing Hamilton’s position, Wills concluded, “The Constitution came about by the people’s *legislative* act” (Emphasis in original) (Wills, 1981/2001, p. 133).

Hamilton’s views received independent corroboration at a much later date by a noted professor of American constitutional law, who arrived at the same understanding via a study of political philosophy. According to Professor Corwin, “[I]n the American *written Constitution*,

higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a *statute emanating from the sovereign people*” (Emphasis in original) (Corwin, 1965, p. 89). As Hamilton saw the necessity of judicial review to uphold the legislative supremacy of the people in establishing the Constitution, so Corwin viewed the theory of judicial review as preserving the nation’s higher law, the Constitution.

[E]ven statutory form could hardly have saved the higher law as *a recourse for individuals* had it not been backed up by *judicial review*. Invested with statutory form and implemented by judicial review, higher law, as with renewed youth, entered upon one of the great periods of its history, and juristically the most fruitful one since the days of Justinian. (Emphasis in original) (Corwin, 1965, p. 89)

The primary purpose of judicial review, therefore, was to protect the concepts of liberty applied to government through the Constitution. Quoting Montesquieu without specifically identifying him, Hamilton wrote, “For I agree that ‘there is no liberty if the power of judging be not separated from the legislative and executive powers” (Federalist No. 78, p 434).<sup>41</sup>

Regarding the state ratifying conventions, James Wilson of Pennsylvania, Oliver Ellsworth of Connecticut, and John Marshall of Virginia presented arguments “that the national government would be limited by the judicial check” (Hall, 1992, p. 465). At the 1788 Virginia Ratifying Convention (in Madison’s presence, with his support, and as part of the federalists’ plan to secure a favorable vote for ratification), future Chief Justice John Marshall pointed to judicial review as a safeguard against undue usurpation of power by the proposed national government.<sup>42</sup> Marshall observed, “If Congress were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard.... They would declare it void” (Hall, 1992, p. 465). At the Connecticut convention, Oliver Ellsworth presented judicial review as a check upon the usurpation of unwarranted power. Ellsworth explained:

This constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. (Bailyn, 1, p. 883)

In the Pennsylvania convention James Wilson explained to delegates that the judiciary would act as a check against unconstitutional legislation. According to Wilson:

[U]nder this constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department.... [T]he power of the constitution was paramount to the power of the legislature, acting under that constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges – when they consider its principles, and find it to be incompatible with the superior power of the constitution, it is their duty to pronounce it void... (Bailyn, 1, pp. 822-823)

Under Article III, § 1 of the U.S. Constitution, Congress enacted the Judiciary Act of 1789 that established the framework and structure for judicial review of federal questions involving constitutional issues and congressional statutes. Senator Oliver Ellsworth, former justice of the Connecticut high court and delegate to the Constitutional Convention, served as both the chair of the Senate committee that drafted the act and as the main author of the bill (Beard, p. 21; Elkins & McKittrick, p. 63; Graber & Perhac, p. 263; Hall, 1992, p. 252). After creating a three-tiered system of federal trial courts, similar to the current system, the act “gave the Supreme Court appellate jurisdiction over those courts’ decisions in civil cases and over state courts’ decisions based on determinations of federal law” (Hall, 1992, p. 457). Thus, the act funneled constitutional issues into the state court systems to be first dealt with by the state judiciaries and their high courts prior to any consideration by the Supreme Court for the issuance of a writ of error to re-examine, reverse, or affirm the state high court’s decision (Elkins &

McKittrick, pp. 63-64; Graber & Perhac, p. 264; Hall, 1992, p. 457). As explained by a constitutional scholar in greater detail:

The most significant restriction in the Judiciary Act of 1789 gave the trial of federal question suits to the state courts. Only upon appeal to the Supreme Court after a final decision was had in the highest court of a state might a federal question actually reach a federal court. (Except for a brief interlude in 1801-1802, federal courts did not obtain general trial jurisdiction over federal questions until 1875). (Hall, 1992, p. 474)

Described as “the enduring blueprint for American’s judicial structure,” the Judiciary Act of 1789 received the approval of eight senators who had served as delegates to the Constitutional Convention.<sup>43</sup> Furthermore, both James Madison, then a member of the House of Representatives, and Thomas Jefferson, then Secretary of State, were aware of the Judiciary Act of 1789 and the procedural framework it established regarding constitutional issues.

Penultimately prior in the precedential listings for judicial review, the Supreme Court invalidated state laws in the period following the adoption of the Constitution and the passage of the Judiciary Act, either as justices on circuit or sitting as a full Court. Unfortunately the opinions of the early circuit courts were not written. However, Justices Jay and Cushing, while on circuit, invalidated the following state legislative actions (Gerber, p. 12):

- Connecticut statute in April, 1791 that conflicted with the Treaty of Peace with England as ratified in 1783.
- Rhode Island statute (re: legal tender) in May, 1791 that conflicted with Article I, § 10 of the Constitution, which stated that “No State shall ... make any Thing but gold and silver Coin a Tender in Payment of Debts.”
- Rhode Island statute (pro-debtor) in June, 1792 that conflicted with Article I, § 10 of the Constitution, which stated that “No State shall ... pass any ... Law impairing the Obligation of Contracts.”

In *Ware v. Hylton*, 3 U.S. 199 (1796), the Supreme Court voided a Virginia statute conflicting with the Treaty of Paris (1783), thus officially establishing the supremacy of treaties over conflicting state laws. The treaty contained a provision assuring that creditors would not meet with legal obstructions to recovering pre-Revolutionary War debts. Virginia had “enacted legislation enabling its citizens to pay debts owed to British subjects into the state treasury in depreciated currency and thereby obtain a certificate of discharge” (Hall, 1992, p. 910). Such state action was ruled a violation of the Supremacy Clause of Article VI of the Constitution. Since the case involved Virginia, both Madison and Jefferson had to be aware of the Court’s use of judicial review as well as the steps taken under the Judiciary Act of 1789 to address the constitutional issue in their home state.

Also, in the first recorded instance of judicially reviewing the constitutionality of a congressional act, the federal circuit courts for New York, Pennsylvania, and North Carolina refused on constitutional grounds to implement provisions of the Invalid Pensioners Act of 1792. The objectionable provisions required federal courts to assume duties that were not judicial in nature, which violated the separation of powers whereby “neither the legislative nor the executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial” (2 U.S. 409, 410). The Supreme Court considered the matter in *Hayburn’s Case*, 2 U.S. 409 (1792). The Court decided “that they would hold the [matter] under advisement, until the next term” (2 U.S. 409). The case became moot when Congress revised the statute by removing the provisions assigning courts nonjudicial duties on February 28, 1793 (2 U.S. 409, 410).

Finally, judicial review had been implicitly established by the U.S. Supreme Court in *Hylton v. United States* (1796), the first case under the new Constitution in which the Court ruled

on the constitutionality of an act of Congress (Hall, 1992, p. 419; Warren, pp. 146-147). Since the constitutional question was the only one argued, it could be contended, quite plausibly, that *Hylton* directly established judicial review. According to the opinion by Justice Chase, the only question before the Court was “whether the law of congress of the 5th of June 1794, entitled, “An act to lay duties upon carriages for the conveyance of persons,’ is unconstitutional and void” (3 U.S. 171, 172). Interestingly Alexander Hamilton presented the federal government’s argument for the constitutionality of the act in question, an act that had been “passed on his recommendation in 1794” (McDonald, 1979, p. 314). His resignation as Secretary of the Treasury had taken effect January 31, 1795 (McDonald, 1979, p. 303). *Hylton* also marked the first time that Hamilton argued a case before the Court, appearing as a “special counsel for the Government” (Warren, p. 148). One of the justices before whom Hamilton argued later wrote:

Mr. Hamilton spoke in our Court, attended by the most crowded audience I ever say there, both Houses of Congress being almost deserted on the occasion. Though he was in ill health, he spoke with astonishing ability, and in a most pleasing manner, and was listened to with the profoundest attention. (Warren, p. 148)

James Madison was one of the unnamed members of Congress who was absent from the House of Representatives and present in the Supreme Court chambers. In writing to Thomas Jefferson about the case, Madison did not mention Hamilton by name, although he disparaged Hamilton’s presentation, which had so impressed other members of the audience, including the Court.<sup>44</sup>

What is important for our purposes, however, is that Madison was both aware and knowledgeable of the first case that directly addressed constitutional issues raised by congressional legislation. And, just as importantly, Jefferson also was aware of *Hylton* due to Madison efforts. Furthermore, the facts in *Hylton* exemplified the procedural approach to be taken in questioning the constitutionality of congressional actions. *Hylton*, impacted by the



legislation, had filed a complaint in federal court challenging the law. When the lower court ruled against him, Hylton had appealed to the Supreme Court which granted him the right of appeal. And although the Court ruled against Hylton, the procedural aspects of mounting a constitutional challenge to federal legislation should have been quite clear, both to Madison as a legislator witnessing the case and to Jefferson, hearing about the case from Madison.

*Specific contents of the resolutions.*

The details of actually getting two states to pass the resolutions were somewhat complicated. The plan, developed after Jefferson had withdrawn from presiding over the Senate as vice president while the Alien and Sedition Acts were passed, was initially developed in Montpelier where Jefferson stopped “to recruit Madison” for a campaign of resistance to the acts (Wills, 2002, p. 48). Madison and Jefferson agreed that Madison should lead the effort in Virginia while Jefferson would use a third party to have a second state issue a similar call to other state legislatures to “nullify the Alien and Sedition Acts,” thus “creating the sense of a groundswell of opposition at the state level (Wills, 2002, pp. 48 & 49). Madison would also be forced to use a third party in the Virginia Assembly since he wasn’t a member of the state legislature. Jefferson initially planned to involve North Carolina, “but a friend from Kentucky said he could it passed there without betraying its authorship” (Wills, 2002, p. 49). Jefferson drafted the Kentucky Resolutions, which were introduced in the state legislature by John Breckinridge, while Madison drafted the Virginia Resolutions that were formally introduced into that state’s legislature by John Taylor (Elkins & McKittrick, p. 719). The Kentucky Resolutions were passed on November 13, 1798, a little over a month before the Virginia Assembly approved the Virginia Resolutions on Christmas Eve, December 24, 1798 (Elkins & McKittrick, p. 719).

After declaring that Kentucky was “determined ... to submit to undelegated and consequently unlimited powers in no man, or body of men on earth,” Jefferson’s original draft contained the following:

[W]here powers are assumed which have not been delegated, a nullification of the act is the rightful remedy: that every State has a natural right in cases not within the compact, (*casus non foederis*,) to nullify of their own authority all assumptions of power by others within their limits.” (Peterson, 1984, p. 453)

Breckinridge deleted this statement along with other references to nullification prior to his presentation of the resolution to the Kentucky legislature. In its place he substituted language that called the acts unconstitutional and called for the states to join a campaign to “repeal the ‘unconstitutional and obnoxious acts’” (Smith, p. 1070; see also Ketcham, p. 396). Although Jefferson didn’t include secession as the next step should nullification fail, he did contemplate the idea as evidenced in his letter to Madison on August 23, 1799, when he proposed an additional three-part plan for follow-up action to the Resolutions. After responding to the various states, after strongly protesting the Alien & Sedition Acts, after restating the Tenth Amendment, after expressing attachment to the Union, after stating an unwillingness to sacrifice the “rights of self government,” and after declaring a willingness to be patient while the rest of the country decides to “rally with us round the true principles of our federal government,” Jefferson arrived at the course of action should they “be disappointed in this” (PJM, 17, p. 258). Should they fail in their endeavor to correct what they regarded as a federal abuse, they must be “determined ... to sever ourselves from that union we so much value, rather than give up the rights of self government which we have reserved, & in which alone we see liberty, safety, & happiness” (PJM, 17, p. 258).

Madison's draft did not use the word nullification. The Virginia Resolutions opened by declaring Virginia's resolve to "maintain and defend" both the federal and state constitutions while "watch[ing] over and oppos[ing] every infraction" of the "principles which constitute the only basis" of the "Union of the States" (PJM, 17, pp. 188 & 189). When an infraction occurred, Madison proposed the following:

that in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the states ... have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them. (PJM, 17, p. 189)

Madison did not clarify what was meant by having the state "interpose" itself or how unconstitutional usurpations of power were to be arrested.<sup>45</sup> Instead he left the meaning and interpretation vague, to be clarified "by the states responding to his call" (Wills, 2002, p. 49).

Although Jefferson's nullification language was removed in favor of the state legislature's pronouncement of the acts being unconstitutional and while Madison had the states interpose themselves in some undefined manner, the conclusions of both the Kentucky and Virginia Resolutions "were for practical purposes interchangeable" (Elkins & McKittrick, p. 719). What was noticeably absent from both sets of resolutions was a call to get the constitutional questions adjudicated, commencing first in the state court system with possible appellate jurisdiction by the U.S. Supreme Court according to the procedures established by both the Judiciary Act of 1789 and the judicial precedents established by state courts (which included Virginia) and the U.S. Supreme Court. One historian offered the following assessment of Madison's and Jefferson's campaign against the Alien and Sedition Acts: "Their nullification effort, if others had picked it up, would have been a greater threat to freedom than the misguided

laws, which were soon rendered feckless by ridicule and electoral pressure” (Wills, 2002, p. 49).

Another historian, commenting upon Jefferson’s Kentucky Resolutions, observed:

This sweeping claim in the name of states’ rights, had it been implemented, would have placed Kentucky in open defiance of federal law; it was an extreme argument that was potentially as dangerous to the Union as the oppressive laws were to individual liberty. (Smith, p. 1070)

One of Madison’s principal biographers evaluated Madison’s Virginia Resolutions:

“Though Madison emphasized that the states would not ‘interpose’ for light or transient reasons, he was nevertheless perfectly clear in asserting their primacy, in judging constitutionality, over the federal courts. They themselves, he observed, might aid and abet usurpations” (Ketcham, p. 397). Madison’s position on state interposition directly countered the position he had taken in both the Constitutional Convention and the *Federalist* regarding separation of powers and the danger posed to republican government by state legislative abuses. In discussing the purposes of the Convention, Madison had criticized Roger Sherman of Connecticut for leaving out the critical reason for the meeting in Philadelphia, that of “Parliamentary injustice” whereby state legislatures endangered “the rights of the minority” (Farrand, I, p. 135). Citing examples drawn from “Rome, Athens & Carthage,” Madison also had cited examples closer to home for the delegates whereby state legislatures had aided debtors in defrauding “their creditors” and helped the “landed interest” to bear “hard on the mercantile interest” (Farrand, I, p. 135). According to Madison, the Convention faced

the necessity, of providing more effectually for the security of private rights, and the steady dispensation of Justice. Interferences with these were evils which had more perhaps than any thing else, produced this convention. Was it to be supposed that republican liberty could long exist under the abuses of it practiced in <some of> the States. (Farrand, I, p. 134)

A noted constitutional historian pointed to the contrast between what early state legislatures said and what they actually did regarding Montesquieu's doctrine of the separation of powers.

According to Professor Corwin:

That the majority of the Revolutionary constitutions recorded recognition of the principle of the separation of powers is, of course, well known. What is not so generally understood is that the recognition was verbal merely, for the reason that the material terms in which it was couched still remained undefined; and this was true in particular of "legislative power" in relation to "judicial power." (Corwin, 1925, p. 514)

Using New Hampshire as an example of the "practices ... in several other states," Professor Corwin, after citing New Hampshire's constitutional acknowledgement of separation of powers, described the state legislature's practice (Corwin, 1925, p. 515):

Notwithstanding which the laws of New Hampshire for the years 1784-1792 are replete with entries showing that throughout this period the state legislature freely vacated judicial proceedings, suspended judicial actions, annulled or modified judgments, cancelled executions, reopened controversies, authorized appeals, granted exemptions from the standing law, expounded the law for pending cases, and even determined the merits of disputes.<sup>46</sup> (Corwin, 1925, p. 514)

It was this general, widespread practice among state legislatures in the aftermath of the Declaration of Independence to which Madison referred when he protested "against 'interferences with the steady dispensation of justice'" on the floor of the Constitutional Convention in response to Roger Sherman's omission of state legislative abuses as a leading cause for the Convention to remedy (Corwin, 1925, p. 513). In *The Federalist*, Madison also explained the Convention's response in the article entitled "NO. 47: THE PARTICULAR STRUCTURE OF THE NEW GOVERNMENT AND THE DISTRIBUTION OF POWER AMONG ITS DIFFERENT PARTS (MADISON)" [sic] (Federalist No. 47, p. 268). Madison first observed that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny" (Federalist No. 47, p.

269). Madison next observed that “the preservation of liberty requires that the three great departments of power should be separate and distinct” (Federalist No. 47, p. 269). Finally, and more pointedly, in terms of earlier concerns about legislative abuses and threats to republican government, Madison emphatically stated, “The entire legislature can perform no judiciary act” (Federalist No. 47, p. 271). Slightly more than a decade later, Madison would recommend exactly the opposite in the Virginia Resolutions.

*Aftermath of the resolutions.*

All states received copies of the Kentucky and Virginia Resolutions condemning the Alien and Sedition Acts. What was their response? According to one historian, the Resolutions “provoked counter-resolutions by all the states north of Virginia, asserting that the right of interpretation rested with the courts” (Brogan, p. 269). According to another historian, “Massachusetts and several other states adopted resolutions upholding the acts.... Washington wrote Patrick Henry on January 15, 1799, that the doctrines of the Virginia Resolutions, if ‘systematically and pertinaciously pursued [will] ... dissolve the Union or produce coercion’” (Ketcham, p. 397). Two historians summarized the actions taken by the other member states of the Union:

Ten, that is, took action, though only seven of those (Delaware, New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, and Vermont) sent actual replies; the others (Maryland, Pennsylvania, and New Jersey) dismissed them by resolution after debate, without then officially transmitting the result to the legislatures of Kentucky and Virginia. The remaining four states, whose legislatures took no action at all, were North and South Carolina, Tennessee, and Georgia. (Elkins & McKittrick, p. 902, n. 72)

Vermont’s reply to Virginia declared, “It belongs not to state legislatures to decide on the constitutionality of laws made by the general government; this power being exclusively vested in the judiciary courts of the Union” (Elkins & McKittrick, p. 720).

In the southern states, the Kentucky and Virginia Resolutions were subsequently referred to as the “Principles of ‘98” (Elkins & McKittrick, p. 720). Fearing reprisal under the Alien and Sedition Acts, Madison and Jefferson had concealed their authorship of the Resolutions. Although his own role in authoring the Virginia Resolutions had become known before 1832, according to historian Garry Wills, “Madison hid as long as he could the fact that Jefferson was the author of the Kentucky Resolutions, and that the original draft of those Resolutions contained nullifying language” (Wills, 2002, p. 162). However, in 1832 during the height of the nullification movement in South Carolina, papers of Jefferson came to public light that contained his original, unamended draft of the Kentucky Resolutions (Elkins & McKittrick, p. 720). Their effect was described:

Jefferson’s conception of state rights, expressed in terms that were a mixture of the extravagant, the threatening, and the vague, were exactly suited to the nullifiers’ purposes. The “principles of ‘98” thereupon became their rallying cry and would be a bible of state-rights particularism down to the Civil War, with Jefferson as its prophet. (Elkins & McKittrick, pp. 720-721)

Also, during the nullification controversy, Madison got to witness Calhoun using Madison’s arguments for state primacy over federal courts regarding constitutionality being used to justify nullification of federal acts by the states (Ketcham, p. 400).

Actually, at the time they were written, no states distinguished between the Kentucky Resolutions and the Virginia Resolutions. Also, no other states found either of them acceptable (Elkins & McKittrick, p. 720). Further adding to the conjunction of the two sets of resolutions was the fact that Madison defended the major assertions of the Resolutions when invited to do so by the Virginia Assembly (Ketcham, pp. 397-400). In doing so, he adamantly argued that the states had primacy over the federal courts “in judging constitutionality” (Ketcham, p. 400). However, most southerners and subsequent writers equated Jefferson rather than Madison with

state rights advocacy.<sup>47</sup> Historians noted that southern secessionists later drew sustenance from the Resolutions. “[A] new edition of the Resolutions published in 1859 gave southern spokesmen a renewed warrant for construing from them a complete theory of state sovereignty accompanied by the right of peaceable secession,” according to Elkins & McKittrick (p. 721). Another historian, noting that the new edition had been published in Richmond, summarized the state rights theory contained in the Resolutions:

The people were sovereign, not collectively as “one people,” but separately as several states; therefore, they could by the exercise of their sovereignty in state conventions secede from the Union... Generally, however, the secession movement was a remarkable testament to the compact theory of government, which Jefferson, more than anyone, had fixed upon the American political mind. (Peterson, 1970, p. 213)

Jefferson Davis, in his inaugural address as President of the Confederacy, relied heavily upon Jefferson’s writings, primarily the Declaration of Independence and the state rights theory set forth in the Kentucky Resolutions. According to a historian quite familiar with Jefferson, the new chief executive of the Confederacy

appealed to “the American idea that governments rest on the consent of the governed, and that it is the right of the people to alter or abolish them at will whenever they become destructive to the ends for which they were established.” The Confederate states, he said, had “merely asserted the rights which the Declaration of Independence in 1776 had defined to be inalienable.” What was inalienable? Not the rights of man, but the rights of the people as members of sovereign polities called states to secede from the union. (Peterson, 1970, pp. 213-214)

In a speech to the U.S. Senate on May 8, 1860, Jefferson Davis had clearly articulated the compact theory of government articulated in the Resolutions when he offered the following: “That, in the adoption of the Federal Constitution, the States adopting the same acted severally as free and independent sovereignties, delegating a portion of their powers to be exercised by the Federal Government for the increased security of each against dangers, *domestic* as well as



foreign...” (Emphasis in original) (Cooper, p. 172). And, in his farewell speech to the U.S. Senate, Jefferson Davis noted the logical end of state sovereignty when he observed that “an essential attribute of State sovereignty” was “the right of a State to secede from the Union” (Cooper, p. 190). Andrew White, a university history professor, fought for the Union in the Civil War. One of his Yale classmates, Randall Gibson, had served as a Confederate general and then later as a U.S. Senator from Louisiana. According to White, Gibson “absolutely detested Thomas Jefferson” because he “considered Jefferson the real source of the extreme doctrine of state sovereignty” (White, p. 443). White offered his own assessment.

[A]fter the Civil War, Jefferson, though still interesting to me, was by no means so great a man in my eyes as he had been. Perhaps no doctrine ever cost any other country so dear as Jefferson’s pet theory of State rights cost the United States: nearly a million of lives lost on battle-fields, in prisons, and in hospitals; nearly ten thousand millions of dollars poured into gulfs of hatred. (White, p. 501)

Writing about Jefferson, one historian summarized Henry Cabot Lodge’s assessment of the conflict between Federalism and the Resolutions:

Nevertheless, Lodge held, contrary to Federalist expectations, the revolution of 1800 did not destroy the national foundations, partly because of Jefferson’s timidity in action, partly because of Marshall and the Supreme Court, ultimately because of the Civil War. The Federalist system proved stronger than its strongest foe, and the Constitution vindicated its energy in the course of American history. (Peterson, 1970, p. 226)

The reach, however, of the Nullification Doctrine extended far into the Twentieth Century. Besides extending forward in time, the idea that a state could nullify federal action was also extended to include Supreme Court decisions as well as congressional action. In the aftermath of the Court’s decision in *Brown v. Board of Education*, oppositional resolutions, or “rhetorical gestures of defiance,” were enacted in southern states (Woodward, p. 157). Interestingly two approaches to state action were used, which mirrored the two approaches

initially proposed by Kentucky and Virginia – the twin ideas of nullification and state interposition between its citizens and federal action. Senator Harry Byrd from Virginia “called upon the South for ‘massive resistance’” (Woodward, p. 156). Conservative leaders from Virginia were the first to claim “the right of ‘interposition’ of state authority against alleged violation of the Constitution by the Supreme Court, and who pointed the way toward the private-school plan as a means of evading the Court’s decision and preserving segregation” (Woodward, p. 156). Alabama’s legislature “was the first actually to apply the fateful words, ‘null, void, and of no effect’ to the Supreme Court school decision” (Woodward, p. 156). Georgia followed Alabama’s “null and void” approach while Mississippi modified its act to eliminate the actual words, “null and void,” but maintained the same meaning through substituting the declaration that the Brown decision was “unconstitutional and of no lawful effect” (Woodward, p. 157). Like Virginia, Louisiana “adopted its interposition resolution without a single negative vote in either house” (Woodward, p. 157). The two Carolinas steered a somewhat milder course than either nullification or interposition. According to C. Vann Woodward, Professor of History at Yale University, “South Carolina contented herself with ‘condemnation of and protest against the illegal encroachment of the central government’” (Woodward, 1966, p. 157). As Professor Vann Woodward noted, “The North Carolina legislature defeated interposition but adopted a ‘resolution of protest’ against the Supreme Court decision” (Woodward, 1966, p. 157).

Four southern states journeyed beyond “rhetorical gestures,” however, and “bluntly proclaimed a policy of open resistance by imposing sanctions and penalties against compliance with the Supreme Court’s decision” (Woodward, 1966, p. 157). Although each state focused on public education, the approaches varied somewhat. Georgia’s legislature focused on school officials and “made it a ‘felony for any school official of the state or any municipal or county

schools to spend tax money for public schools in which the races [were] mixed” (Woodward, 1966, p. 157). Louisiana’s legislature focused on accreditation and withheld state “approval and funds ‘from any school violating the segregation provisions’ of its laws” (Woodward, 1966, p. 157). Mississippi’s state legislature focused on the authority of state law and “made it unlawful for the races to attend publicly supported schools together at the high school level or below” (Woodward, 1966, p. 157). North Carolina’s legislature focused on public school funding, broadened coverage beyond school officials to include school boards, and denied “funds to local authorities who integrated their schools” (Woodward, 1966, p. 157). Not content with the passage of mere legislation, both Louisiana and Mississippi “amended their constitution[s]” to require the separation of public schools “for white and Negro children” in order “to promote public health and morals” (Woodward, 1966, pp. 157-158).

The lead taken by the seven southern states influenced other southern states as well.<sup>48</sup> By New Year’s Eve, 1956, “eleven southern states had placed a total of 106 pro-segregation measures on their law books” in defiance of the Supreme Court’s ruling that segregated public schools were both unlawful and unconstitutional (Woodward, 1966, p. 162). Florida, Arkansas, Tennessee, and Texas had both followed the lead set by the other seven states and also responded to Senator Byrd’s call for massive resistance to the Court’s *Brown* ruling that held “Separate But Equal” to be unconstitutional when applied to public education. “Nullification” and “Interposition” had traveled some distance since their first articulation by Jefferson and Madison. Beginning as simple opposition to federal acts deemed unconstitutional, the twin doctrines subsequently became wedded to the South during the Nullification Crisis, lent legitimacy to the idea of secession when the southern states felt the continuation of their slave-based economy was threatened, and finally were completely committed to racism after the United States Supreme

Court undercut the legal underpinnings of segregation in public education. What remained constant throughout the journey, however, was the rejection of judicial review as an accepted procedure of conflict resolution.

### **Summary of the historical background.**

Just as geographic faults are revealed by the movement of subterranean tectonic plates, so the political fault line in United States history is revealed by the movement from colonies asserting their rights against a king to sovereign states dominating the national government under the Articles of Confederation to a national government with continued arguments about sovereignty under the Constitution of the United States. The fault line issues illustrate a long and arduous process of adaptive work that has taken place in our country and, in some respects, remains ongoing. As Heifetz defined adaptive work, it is the learning required “to diminish the gap between” where people are and the goal they have set for themselves (Heifetz, 1994, p. 22). According to Heifetz, “Adaptive work requires change in values, beliefs, or behavior” (Heifetz, 1994, p. 22). For the new republic emerging under the newly adopted Constitution, adaptive work meant closing the gap between the realities of a life as governed by colonial-state supremacy towards the vision of an American nation envisioned by the Constitution. Primary attachment and loyalty needed to be changed from the state in which one resided to the nation, for example, from the Commonwealth of Virginia to the United States. The task was made more difficult in that there were no clear models from history, either current or past, to guide them.

Many of the arguments that were heard later in courtrooms derived from disagreements heard long before *McCullough v. Maryland*, the first case before the Supreme Court involving a dispute between national and state supremacy, between the Necessary & Proper Clause and the Tenth Amendment, as well as a dispute over what the Constitution was and how it should be

interpreted. The early pre-*McCullough* constitutional disputes examined in this paper always involved Madison and centered on Hamilton's economic proposals, Jay's Treaty, the Kentucky & Virginia Resolutions, and, indirectly, *Marbury v. Madison*. Issues included broad versus strict construction of the Constitution's meaning, the nature of the Constitution (was it "a charter for government" or a "legalistic code of government operations")<sup>49</sup>, whether the Constitution was in fact a constitution springing from the people or a compact between the states, judicial review versus state review of congressional acts, and the limits of governments, both state and federal. While some of the issues have been resolved, a few issues continue to be argued today, most notably the interplay of state and national sovereignties under federalism as well as questions about how to interpret the Constitution.

In many ways, Madison's (and Jefferson's) opposition to the adaptive work taking place in our nation's early history occurred for political, as opposed to principled, reasons. Because he opposed current political developments, Madison turned his back on previously stated positions that each had a long, public history. With his opposition to the First Bank of the United States, Madison turned from a long record of espousing implied powers through a broad interpretation to a position advocating strict construction. With his opposition to Jay's Treaty, Madison turned his back on his own record in the Constitutional Convention (the Senate as the legislative body involved with foreign treaties) to a position whereby the House (of which he was a member) should also be involved. With his opposition to the Alien and Sedition Acts through the Kentucky and Virginia Resolutions, Madison turned his back on judicial review (previously supported in the Constitutional Convention, in *The Federalist Papers*, and the Judiciary Act of 1789) in favor of a vague, unclear form of state review, itself the nucleus of a state rights' position that would later be expanded. Ironically, with his promotion of state review, Madison

also contradicted his views regarding pre-Constitutional state legislative abuses as well as contravened the doctrine regarding the separation of governmental powers. And, as Secretary of State, Madison acted illegally in withholding Marbury's commission, again for political reasons. Given these examples, it is difficult to argue against the proposition that Madison played politics with the Constitution, that his behavior was both opportunistic and unprincipled. Yet, Madison possessed constitutional strengths as well and enjoyed being the "power behind the throne" for a while. His Virginia Plan dominated the discussions of the Constitutional Convention. In the early years of the first administration, Madison was the person Washington frequently turned to regarding procedural questions. Madison, more than any other person, was responsible for the fact that our Constitution has a Bill of Rights. Yet, in the final analysis, it is extremely difficult to effectively argue against the validity of George Washington's final assessment of his old friend and confidant, Madison, as "duplicitous and dishonorable" (Wills, 2002, p. 43).

Madison and Jefferson were the most prominent men to speak in favor of strict construction. One of the problems with strict construction is its negation of implied powers, without which in some form, the country could not be governed. Strict construction, as two historians noted,

is in a special sense the resort of persons under ideological strain. It represents a willingness to renounce a range of positive opportunities for action in return for a principle which will inhibit government from undertaking a range of things one does not approve of. It marks the point at which one prefers to see the Constitution not as a sanction for achieving one's own ends but as a protection against those designs of others which have come to be seen as usurping and corrupting. (Elkins & McKittrick, p. 234)

A limit to implied powers exists, but, in this writer's opinion, it does not center on the negation of implied powers. Rather the limit may be found in federalism, both in a constitutional and a public policy sense.

## Case Law of the Tenth Amendment

**The tenth amendment as-a restriction/not-as-a-restriction on federal government activity.**

*McCulloch v. Maryland, 17 U.S. 316 (1819).*

*Facts & procedural history.*

*McCullough* marks the first courtroom clash between two component portions of the Constitution, the Tenth Amendment and the Necessary & Proper Clause. The technical issue focused on the constitutionality of an act of Congress creating a national bank with a subsidiary issue being the ability of a state to levy taxes on a federal bank located within its borders. The underlying fundamental issues involved two deep-seated strains of American polity that intricately intertwined: first, the jurisdictional clash between states' rights advocates and those favoring a strong national government; second, an ongoing dispute about how the Constitution should be interpreted between those favoring a strict construction of its meaning and those favoring a broader, more expansive construction. In the latter clash, each side drew advocates from the original framers into an argument that pitted two of the three co-authors of *The Federalist Papers* against each other. James Madison and Thomas Jefferson, author of the Declaration of Independence, believed in a strict construction of the Constitution's meaning while Alexander Hamilton and George Washington, Chair of the Constitutional Convention, firmly believed that the Constitution should be interpreted in a broader sense.

As discussed in greater detail earlier in this chapter, the issue of the Bank of the United States first surfaced in President Washington's presidency when Alexander Hamilton proposed it in his capacity as Secretary of the Treasury. James Madison, U.S. Representative from Virginia, and Thomas Jefferson, Secretary of State, both opposed Hamilton's proposal as being "unauthorized by the Constitution" (Hall, 1992, p. 536). The proposed federal bank provided the

foundation by which Hamilton intended to move the United States to a solid financial position through a combination of “government borrowing and private finance” designed to finance both the national debt (instead of repudiating it) and the “outstanding debts of the states from the Revolutionary War” (some “£80 million of worthless, or nearly worthless, paper debts”) (Brogan, p. 266). Virginia opposed the assumption of the states’ war debts because it had already paid its debts and would be now forced to contribute to paying for the debts of states that had not been fiscally responsible (Elkins & McKittrick, pp. 120).

Both President Washington and Congress were persuaded by Hamilton’s arguments and the Bank was chartered for a twenty-year period. Although Jefferson was not President when the charter was set to expire in 1811, his followers dominated Congress and refused to renew the Bank’s charter. This provided some irony since the Louisiana Purchase by President Jefferson was financed primarily through foreign loans made possible by Hamilton’s policy to strengthen the country’s financial condition centering on the U.S. Bank – without the foreign loans there would have been no Louisiana Purchase (Brogan, p. 270). The next five years also coincided with the War of 1812 and resulted in inflation, discredited state bank notes, and “economic chaos” (Hall, 1992, p. 537). To remedy the poor financial conditions existing in the country, Congress reversed its position and enacted legislation chartering the Second Bank of the United States in 1816.

Opposition to the bank on constitutional grounds continued to exist. Maryland, Pennsylvania, North Carolina, Georgia, Kentucky, and Ohio each passed state legislation to tax the federal bank and its branch offices within their respective borders. James McCulloch, head of the Baltimore branch of the U.S. Bank, refused to pay the tax levied by Maryland. The State of Maryland filed suit in Baltimore County Court where the state law taxing the U.S. Bank was



upheld. Upon appeal the Court of Appeals of Maryland, the state's highest court, affirmed the judgment of the Baltimore County Court upholding the legality of the state tax. Upon appeal by McCullough and the U.S. Bank, the U.S. Supreme Court agreed to hear the case on a writ of error.

*Legal questions.*

First, does Congress have the constitutional authority to incorporate a bank? Second, supposing Congress does have the authority to charter a bank, can that bank establish branches in the several states on its own authority without further congressional action? Third, does a state government have the power to tax a federal bank without violating the Constitution?

*Legal reasoning of opposing parties.*

In retrospect, it is difficult to imagine a more intimidating team of attorneys than those arguing for the original defendant in the case, subsequently designated the plaintiff in error through the appeal process, the federal government. If Ruth, Gehrig, and Lazzeri formed the heart of "Murders' Row" for the dominating New York Yankees major league baseball team, then Webster, Wirt, and Pinkney, the trio of legal advocates for the federal government in *McCullough*, would constitute their counterpart on any team of historical attorneys with winning records before the U.S. Supreme Court. Individually, each posed a formidable legal adversary. In tandem the three legal advocates formed what must have been a dominating and overwhelming team of indomitable attorneys possessing an overpowering aura of invincibility. Daniel Webster argued 249 cases before the Supreme Court where he made "many eloquent arguments" (Hall, 1992, p. 921). William Pinkney served as the U.S. Attorney General from 1811-1815 and was described as "the leading member of the Supreme Court bar" in his later years (Hall, 1992, p. 635). William Wirt served as the U.S. Attorney General from 1817-1824

and argued 174 cases before the Court, “some as attorney general for the government and more as counsel for private clients” (Hall, 1992, p. 934). Subsequent to *McCullough*, he served as an advocate for the Cherokee Nation in *Worcester v. Georgia*, 31 U.S. 515 (1832), a landmark case in American Indian law.

Daniel Webster opened the argument for the United States. He began by noting that it was somewhat late to be challenging the constitutionality of a law originally passed in 1791, some twenty-eight years ago. Observing that the constitutional issue “arose early after the adoption of the constitution, and was discussed and settled, so far as legislative decision could settle it, in the first congress,” Webster pointed out that “each succeeding congress has acted and legislated on the presumption of the legal existence of such a power in the government” (p. 323). Noting further that “[t]he executive government has acted upon it; and the courts of law have acted upon it,” Webster concluded:

When all branches of the government have thus been acting on the existence of this power, nearly thirty years, it would seem almost too late to call it in question, unless its repugnancy with the constitution were plain and manifest. (p. 323)

Pinkney, the last member of the federal government’s legal team to argue before the Court, expanded this point. He first reiterated Webster:

The constitutionality of the establishment of the bank, as one of the means necessary to carry into effect the authorities vested in the national government, is no longer an open question. It has been long since settled by decisions of the most revered authority, legislative, executive, and judicial. (p. 378)

Pinkney then argued that the original legislative construction of the act chartering the First Bank of the United States entitled it to respect because of two major points:

The first is, that it was a contemporaneous construction; the second is, that it was made by the authors of the constitution themselves. The members of the convention who framed the constitution, passed into the first congress,

by which the new government was organized; they must have understood their own work. (pp. 378-379)

Wirt, too, argued that the previous practices of approving and implementing the legislation deserved the status of precedence. According to Wirt, “After a lapse of time, and so many concurrent acts of the public authorities, this exercise of power must be considered as ratified by the voice of the people, and sanctioned by precedent” (p. 176).

Wirt presented a strong argument linking the government’s action in chartering a bank with the Necessary & Proper Clause.

The power to establish such a corporation is implied, and involved in the grant of specific powers in the constitution; because the end involves the means necessary to carry it into effect. A power without the means to use it, [sic] is a nullity. But we are not driven to seek for this power in implication: because the constitution, after enumerating certain specific powers, expressly gives to congress the power “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.” (p. 353)

Wirt continued:

If, therefore, the act of congress establishing the bank was necessary and proper to carry into execution any one or more of the enumerated powers, the authority to pass it is expressly delegated to congress by the constitution. We contend, that it was necessary and proper to carry into execution several of the enumerated powers, such as the powers of levying and collecting taxes ...; of paying the public debts ...; of borrowing money ...; of regulating commerce ...; of raising and supporting armies and a navy; and of carrying on war. (pp. 353-354)

Wirt concluded his argument by stating, “To make a law constitutional, nothing more is necessary than that it should be fairly adapted to carry into effect some specific power given to congress” (p. 356).

The federal government’s legal team recognized that the argument favoring the supremacy of the Necessary & Proper Clause depended upon a loose construction of the

Constitution emphasizing implied powers. Pinkney addressed this issue directly. After observing that many members of the first congress, which followed the adoption of the Constitution, had participated in the Constitutional Convention and that they must have “understood their own work” in legislating for the establishment of a national bank, Pinkney analyzed the implications of such activity.

They determined that the constitution gave to congress the power of incorporating a banking company. It was not required, that this power should be expressed in the text of the constitution; it might safely be left to implication. An express authority to erect corporations generally, would have been perilous; since it might have been constructively extended to the creation of corporations entirely unnecessary to carry into effect the other powers granted... (p.379)

Pinkney concluded, “The power of erecting corporations is not an end of any government; it is a necessary means of accomplishing the ends of all governments. It is an authority inherent in, and incident to, all sovereignty” (p. 383).

The issue of implied powers also, according to the plaintiff’s attorneys, followed from the nature of a constitution as a blueprint and not a detailed legal code. Wirt observed:

[T]o have enumerated the power of establishing corporations, among the specific powers of congress, would have been to change the whole plan of the constitution; to destroy its simplicity, and load it with all the complex details of a code of private jurisprudence. The power of establishing corporations is not one of the ends of government; it is only a class of means for accomplishing its ends, An enumeration of this particular class of means, omitting all others, would have been a useless anomaly in the constitution. (pp. 357-358)

Noting the difference between means and end, Wirt concluded that the constitution dealt with the end or purpose of government to which the means for achieving designated purposes needed to relate.

Among the multitude of means to carry into execution the powers expressly given to the national government, congress is to select, from time to time, such as are most fit for the purpose. It would have been impossible to

enumerate them all in the constitution; and a specification of some, omitting others, would have been wholly useless. The court, in inquiring whether congress had made a selection of constitutional means, is to compare the law in question with the powers it is intended to carry into execution... (pp. 356-357)

Pinkney straightforwardly addressed the intersection of the Tenth Amendment and the idea of implied powers implicit in the promulgation of the supremacy of the Necessary & Proper Clause for the issue at hand by grounding his presentation in the events of the Constitutional Convention.

The reservation in the 10th amendment to the constitution, of “powers not delegated to the United States,” is not confined to powers not expressly delegated. Such an amendment was indeed proposed; but it was perceived, that it would strip the government of some of its most essential powers, and it was rejected. Unless a specific means be expressly prohibited to the general government, it has it, within the sphere of its specified powers. (p. 384)

Intertwined within Pinkney’s argument were comments about the nature of the Constitution as a blueprint for government, not as a legal code detailing an endless catalog of minutiae, and remarks about the impossibility of legislating in detailed fashion for an unforeseen future.

It was impossible for the framers of the constitution to specify, prospectively, all these means, both because it would have involved an immense variety of details, and because it would have been impossible for them to foresee the infinite variety of circumstances, in such an unexampled state of political society as ours, for ever changing and for ever improving. How unwise would it have been, to legislate immutably for exigencies which had not then occurred, and which must have been foreseen but dimly and imperfectly! (p. 385)

Pinkney added yet another plank into the platform erected upon the Necessary & Proper Clause, that of congressional action constituting a political action within the boundary of the Constitution that lies beyond the judgment of the other branches of government.

The power of passing all laws necessary and proper to carry into effect the other powers specifically granted, is a political power; it is a matter of legislative discretion, and those who exercise it, have a wide range of choice

in selecting means.... Congress alone has the fit means of inquiry and decision. (pp. 386-387)

Pinkney concluded that it was “the duty of the court to construe the constitutional powers of the national government liberally, and to mould them so as to effectuate its great objects” (p. 386).

Webster did not address the second legal question in his arguments, but Wirt, following Webster and Hopkinson (the first attorney to argue for the State of Maryland), did. Assuming the congressional action to be constitutional, Wirt stated that “the right to establish the branches of that bank in the different states of the Union follows, as an incident of the principal power” (p. 178). Wirt provided clarification:

The right, then, to establish these branches, is a necessary part of the means. This right is not delegated by congress to the parent bank. The act of congress for the establishment of offices of discount and deposit, leaves the time and place of their establishment to the directors, as a matter of detail. When established, they rest, not on the authority of the parent bank, but on the authority of congress. (pp. 359-360)

The third legal question focused on the ability of the State of Maryland to tax the Baltimore branch of the Second Bank of the United States. Webster addressed the issue by reviewing federalism and posing questions about the resolution of possible conflicts between the federal and state governments.

The people of the United States have seen fit to divide sovereignty, and to establish a complex system. They have conferred certain powers on the state governments, and certain other powers on the national government. As it was easy to foresee that question must arise between these governments thus constituted, it became of great moment to determine, upon what principle these questions should be decided, and who should decide them. (p. 326)

Answering the questions rhetorically posed, Webster undercut a portion of the states’ rights position by affirming that the Court was the final adjudicator and by pointing to the Supremacy Clause without mentioning it by name or specifying its location in the Constitution.

The constitution, therefore, declares, that the constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions which may be incompatible therewith; and it confides to this court the ultimate power of deciding all question arising under the constitution and laws of the Untied States. (pp. 326-327)

Given this understanding, Webster concluded, the act of Congress “must have its full and complete effects” (p. 330). He continued:

Its operation cannot be either defeated or impeded by acts of state legislation. To hold otherwise, would be to declare, that congress can only exercise its constitutional powers, subject to the controlling discretion, and under the sufferance, of the state governments. (p. 330)

Wirt brought the Supremacy Clause to bear directly on the Tenth Amendment. First, he posed Maryland’s argument in favor of state taxation of the Second Bank of the United States:

But it is objected, that, by the 10th amendment of the constitution, all powers not expressly delegated to the United States, nor prohibited to the states, are reserved to the latter. It is said, that this being neither delegated to the one, nor prohibited to the other, must be reserved: and it is also said, that the only prohibition on the power of state taxation, which does exist, excludes this case, and thereby leaves it to the original power of the states. The only prohibition is, as to laying any imposts, or duties on imports and exports, or tonnage duty, and this, not being a tax of that character, is said not to be within the terms of the prohibition; and consequently, it remains under the authority of the states. (p. 360)

Having posed the objection to the federal government’s position, Wirt then proceeded to trump it with the Supremacy Clause which he spelled out in clear and certain terms. First, Wirt observed, the State of Maryland did not correctly note “the whole sum of constitutional restrictions on the authority of the states” (p. 360). Continuing, Wirt drew attention to the Supremacy Clause.

There is another clause in the constitution, which has the effect of a prohibition on the exercise of their authority, in numerous cases. The 6th article of the constitution of the United States declares, that the laws made in pursuance of it, “shall be the supreme law of the land, anything in the constitution, or laws of any state to the contrary notwithstanding.” By this declaration, the states are prohibited from passing any acts which shall be repugnant to a law of the United States. (pp. 360-361)

Wirt then asserted that the same constitutional ground upholding Congress' ability to establish a national bank also "excludes all interference with the exercise of the power by the states" (p. 361). The authority of Congress to ordain a bank "to carry into execution its specified powers" is a power that "cannot be interfered with, or controlled in any manner, by the states, without putting at hazard the accomplishment of the end..." (p. 361). Wirt concluded by portraying Maryland's arguments as being consistent with the repudiated Articles of Confederation, a position that placed the state in opposition to the current Constitution.

But, surely, the framers of the constitution did not intend, that the exercise of all the powers of the national government should depend upon the discretion of the state governments. This was the vice of the former confederation, which it was the object of the new constitution to eradicate. (p. 362)

Pinkney addressed the issue of the origin of government undergirding Maryland's argument for supremacy of the Tenth Amendment. Jones had previously articulated the states' rights argument for the State of Maryland that linked the Tenth Amendment with the compact theory of the Constitution.

It is insisted, that the constitution was formed and adopted, not by the people of the United States at large, but by the people of the respective states. To suppose, that the mere proposition of this fundamental law threw the American people into one aggregate mass, would be to assume what the instrument itself does not profess to establish. It is, therefore, a compact between the states, and all the powers which are not expressly relinquished by it, are reserved to the states. (p. 363)

Countering the compact theory presented by Jones, Pinkney declared:

[T]he constitution acts directly on the people, by means of powers communicated directly from the people. No state, in its corporate capacity, ratified it; but it was proposed for adoption to popular conventions. It springs from the people, precisely as the state constitution springs from the people, and acts on them in a similar manner.... The state sovereignties are not the authors of the constitution of the United States. They are preceding



in point of time, to the national sovereignty, but they are postponed to it, in point of supremacy, by the will of the people. (pp. 377-378)

Attorneys for the State of Maryland favored a strict construction of the Constitution's meaning. They interpreted "necessary and proper" to indicate absolute necessity with no other alternative. According to Hopkinson, the State of Maryland agreed that the power of establishing a national bank was not a power "expressly granted by the constitution," that it had "been obtained by implication ... by reasoning from the 8th section of the 1st article of the constitution; and asserted to exist, not of and by itself, but as an appendage to other granted powers, as necessary to carry them into execution" (p. 331). However, what was once a necessity might not later be considered a necessity. Such a power, Hopkinson reasoned,

has relation to circumstances which change; in a state of things which may exist at one period, and not at another. The argument might have been perfectly good, to show the necessity of a bank, for the operations of the revenue, in 1791, and entirely fail now, when so many facilities for money transactions abound, which were wanting then. (p. 331)

Jones, following Webster, Hopkinson, and Wirt in arguing before the Court, further articulated how the phrase "necessary and proper" should be interpreted.

No terms could be found in the language, more absolutely excluding a general and unlimited discretion than these. It is not "necessary or proper," but "necessary and proper." The means used must have both these qualities. It must be, not merely convenient – fit – adapted – proper, to the accomplishment of the end in view; it must likewise be necessary for the accomplishment of that end. (pp. 366-367)

To ensure correct understanding of strict construction, Jones further explained:

Many means may be proper, which are not necessary; because the end may be attained without them. The word "necessary," is said to be a synonyme [sic] of "needful." But both these words are defined "indispensably requisite;" and, most certainly, this is the sense in which the word "necessary" is used in the constitution. (p. 367)

Jones further expanded the argument for a strict construction of the Constitution, declaring that both the ends and means of governmental powers were spelled out in the federal document. Jones argued, “The constitution does not profess to prescribe the ends merely for which the government was instituted, but also to detail the most important means by which they were to be accomplished” (p. 364). He continued:

[W]e contend, that the government of the United States must confine themselves, in the collection and expenditure of revenue, to the means which are specifically enumerated in the constitution, or such auxiliary means as are naturally connected with the specific means. But what natural connection is there between the collection of taxes, and the incorporation of a company of bankers? (pp. 364-365)

Martin, the Attorney-General of Maryland, immediately followed Jones and argued against implied powers and for a strictly literal interpretation of the Constitution. Martin first opined, “That the scheme of the framers of the constitution, intended to leave nothing to implication, will be evident, from the consideration, that many of the powers expressly given are only means to accomplish other powers expressly given” (p. 373). He asked:

If, then, the convention has specified some powers, which being only means to accomplish the ends of government, might have been taken by implication; by what just rule of construction, are other sovereign powers, equally vast and important, to be assumed by implication? (pp. 373-374)

Martin responded:

We insist, that the only safe rule is, the plain letter of the constitution; the rule which the constitutional legislators themselves have prescribed in the 10th amendment, which is merely declaratory; that the powers not delegated to the United States, nor prohibited to the states, are reserved to the states respectively, or to the people. (p. 374)

Martin then applied a strict construction of the Constitution’s meaning to the issue being argued before the Court.

The power of establishing corporations is not delegated to the United States, nor prohibited to the individual states. It is, therefore, reserved to the states,

or to the people. It is not expressly delegated, either as an end, or a means, of national government. It is not to be taken by implication, as a means of executing any or all of the powers expressly granted... (p. 374)

Addressing the second question, which presumed the constitutionality of the act establishing the national bank, Hopkinson began by reframing the question in language more favorable to Maryland's position.

If this Bank of the United States has been lawfully created and incorporated, we next inquire, whether it may, of its own authority, establish its branches in the several states, without the direction of congress, or the assent of the states? (p. 334)

In language expressing incredulity at the very notion of possibility, Hopkinson further asked:

[C]an it be contended, that the state rights of territory and taxation are to yield for the gains of a money-grading corporation; to be prostrated at the will of a set of men who have no concern, and no duty but to increase their profits? (p. 335)

Maryland's attorneys responded by again arguing that "necessary and proper" indicated necessity. Hopkinson declared, "This power to establish branches, by the directors of the bank, must be maintained and justified, by the same necessity which supports the bank itself, or it cannot exist" (p. 334). Such a necessity did not currently exist, according to the attorneys for the defendant-in-error. And, Hopkinson noted, the action being contested constituted an unconstitutional delegation of authority:

If this power belongs to congress, it cannot be delegated to the directors of a bank, any more than any other legislative power may be transferred to any other body of citizens.... The establishment of a bank in a state, without its assent ... is a higher exercise of authority, than the creation of the parent bank.... Such an exercise of sovereign power, should, at least, have the sanction of the sovereign legislature, to vouch that the good of the whole requires it, that the necessity exists which justifies it. (pp. 336-337).

The third legal question formed the crux of the matter, whether a state could tax a federal entity, in this case, the Second Bank of the United States. Hopkinson for the State of Maryland quickly reframed the question in terms of sovereignty.

[I]f a state may no longer decide, whether a trading association, with independent powers and immunities, shall plant itself in its territory, carry on its business, make a currency and trade on its credit, raising capitals for individuals as fictitious as its own; it all this must be granted, the third and great question in this cause presents itself for consideration; that is, shall this association come there with rights of sovereignty, paramount to the sovereignty of the state, and with privileges possessed by no other persons, corporations or property in the state? in [sic] other words, can the bank and its branches, thus established, claim to be exempt from the ordinary and equal taxation of property, as assessed in the states in which they are placed? (p. 337)

Hopkinson then connected not only the issue of sovereignty with the idea of a strict construction of the Constitution's meaning, but also linked the third legal question to the previous two questions.

As this overwhelming invasion of state sovereignty is not warranted by any express clause or grant in the constitution, and never was imagined by any state that adopted and ratified that constitution, it will be conceded, that it must be found to be necessarily and indissolubly connected with the power to establish the bank, or it must be repelled. (pp. 337-338)

At this point, Hopkinson refreshed the Court's memory regarding past attitudes brought to bear by the Court regarding possible conflicts between the federal government and the states which also served to communicate a fall-back position should the Court not be convinced of Maryland's linking the three questions into a unified whole.

The Court has always shown a just anxiety to prevent any conflict between the federal and state powers; to construe both so as to avoid an interference, if possible, and to preserve that harmony of action in both, on which the prosperity and happiness of all depend. If therefore, the right to incorporate a national bank may exist, and be exercised consistently with the right of the state, to tax the property of such bank within its territory, the court will maintain both rights; although some inconvenience or diminution of advantage may be the consequence. (p. 338)

Having connected state sovereignty to a strict construction of the Constitution and having reminded the Court of its responsibility when state and federal sovereignties collide, Hopkinson next proceeded to connect both to a strict interpretation of “necessary and proper” as meaning “necessity.”

It is not for the directors of the bank to say, you will lessen our profits by permitting us to be taxed; if such taxation will not deprive the government of the uses it derives from the agency and operations of the bank. The necessity of the government is the foundation of the charter; and beyond that necessity, it can claim nothing in derogation of state authority. (p. 338)

Finally, after offering a false premise to highlight what he believed to be the strength of the state’s position, Hopkinson firmly anchored his full argument for the State of Maryland in the constitutional provisions of the Tenth Amendment.

If the power to erect this corporation were expressly given in the constitution, still, it would not be construed to be an exclusion of any state right, not absolutely incompatible and repugnant. The states need no reservation or acknowledgment of their right; all remain that are not expressly prohibited, or necessarily excluded... (p. 338)

As Hopkinson noted later in his argument, “Whatever may be the right of the United States to establish a bank, it cannot be better than that of the states. Their lawful power to incorporate such institutions has never yet been questioned...” (p. 350). Having illustrated the power of establishing corporations as a co-equal power, Hopkinson next proceeded to establish taxation as another co-equal power that was grounded in the Tenth Amendment.

Granting, that these rights are equal in the two governments; and that the sovereignty of the state, within its territory, over this subject, is but equal to that of the United States; and that all sovereign power remains undiminished in the states, except in those cases in which it has, by the constitution, been expressly and exclusively transferred to the United States: the sovereign power of taxation (except on foreign commerce) being, in the language of the Federalist, co-equal to the two governments... (pp. 350-351)

Refuting the argument that states were prohibited from “passing laws, which shall impair the obligation of contracts,” Hopkinson concluded his arguments on behalf of the state by articulating what he believed to be the natural conclusion resulting from the state rights’ position:

[T]he United States cannot, either by a direct law, or by a contract with a third party, take away any right from the states, not granted by the constitution; they cannot do, collaterally and by implication, what cannot be done directly. Their contracts must conform to the constitution, and not the constitution to their contracts. (pp. 351-352)

*Holding & disposition.*

The federal government’s arguments as presented by Daniel Webster, William Wirt, and William Pinkney prevailed on all three legal questions. Chief Justice John Marshall delivered the Court’s decision. Regarding the first question as to the ability of Congress to charter a bank, the Court unanimously declared:

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land. (p. 424)

The Court’s decision on the second question regarding the constitutionality of the chartered bank’s decisions to establish branch banks in various states flowed from the Court’s ruling on the first question.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise, to locate them in the charter, and it would be unnecessarily inconvenient, to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches; and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary. (pp. 424-425)

The Court framed the third question as, “Whether the state of Maryland may, without violating the constitution, tax that branch” (p. 425)? Several pages later, the Court provided a definitive

ruling that left no doubt that the national government had made the transition to the Constitution and no longer operated in any manner similar to the previous restrictions placed upon it by the states under the old Articles of Confederation.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. (p. 436)

The Court “reversed and annulled” the judgment of the Court of Appeals of the State of Maryland as well as the original judgment reached by the Baltimore County Court (p. 437). The Court also ordered “that judgment be entered in the said Baltimore country court for the said James W. McCulloch,” the head of the Baltimore branch of the Second Bank of the United States (p. 437).

*Court’s rationale.*

Writing for the unanimous Court, Chief Justice John Marshall first struck down the states’ rights position that the federal government owed its existence to the states. He first summarized the states’ rights argument: “The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion” (p. 402). Marshall then declared, “It would be difficult to sustain this proposition” (p. 403). The Chief Justice dismissed the notion that because the ratifying conventions were held in the states that such activity represented state action by holding it up to ridicule:

It is true, they assembled in their several states – and where else should they have assembled? No political dreamer was ever wild enough to think of

breaking down the lines which separate the states, and of compounding the American people into one common mass. (p. 403)

Marshall continued by noting what that action actually represented: “Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments” (p. 403).

The Chief Justice further noted the determining line of demarcation that made the ratification an act of the people and not one of the state governments:

The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmation, and could not be negated, by the state governments. (p. 404)

Chief Justice Marshall summarized the Court’s position on the origin of American government under the U.S. Constitution.

The government of the Union, then ... is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. (pp. 404-405)

Preliminary to addressing the question of how to interpret the Constitution, the Chief Justice addressed the issue of constitution-as-blueprint versus constitution-as-legal-code.

Marshall began by discussing the nature and end result of constitution-as-legal-code:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. (p. 407)

The Chief Justice next proceeded to discuss constitution-as-blueprint, grounding it in both the nature of constitutions and the intentions of the constitutional framers:

Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose



those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. (p. 407)

Later Marshall also noted the separate purposes of legal codes and constitutions. He additionally commented on the difficulties of foreseeing all possible future difficulties and requirements. An attempt to turn the constitution into a legal code with complex specificity would have also negated attempts of future governments to avail “itself of experience, to exercise its reason, and to accommodate its legislation to circumstances” (p. 415):

To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. (p. 415)

It is within this context that Chief Justice Marshall uttered his famous and oft-quoted statement, “[W]e must never forget that it is a *constitution* we are expounding” (Emphasis in original) (p. 407).

As might be surmised, constitution-as-legal-code links with a strict construction of the Constitution’s meaning while constitution-as-blueprint favors a broader construction. Regarding the issue of implied powers, the Chief Justice pointed out a critical difference between the Articles of Confederation and the Constitution. Whereas the Articles of Confederation contained wording which excluded “incidental or implied powers,” the Constitution contained no such wording nor did it contain any phrases that would require “that everything granted shall be expressly and minutely described” (p. 406). This constitutional concept carried over into the Tenth Amendment that was adopted subsequent to constitutional ratification, according to the Chief Justice.

Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word “expressly,” and declares only, that the powers “not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;” thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it, to avoid those embarrassments. (pp. 406-407)

In other words, the U.S. Constitution was to be interpreted as a constitutional blueprint for American government in broad terms, not as a legal code with exacting and strict minutiae covering every specific possibility that might be encountered for all time. Having established the Constitution as proceeding from the people and not from the states, having expounded the nature of a constitution and how it should be interpreted, the Court proceeded to examine how the Necessary and Proper Clause should be interpreted. Was it, as Maryland urged, a “clause, though, in terms, a grant of power, ...not so in effect...” (p. 412)? Was the Necessary and Proper Clause “really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers” as claimed by Maryland (p. 412)? Did the word *necessary* control “the whole sentence,” limit “the right to pass laws for the execution of the granted powers,” and exclude “the choice of means” (p. 413)? Does the word *necessary* “always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other” (p. 413)? Chief Justice Marshall answered these questions with a single declaration, “We think it does not” (p. 413). He explained:

To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea.... It is essential to just construction, that many words which import something

excessive, should be understood in a more mitigated sense – in that sense which common usage justifies.... This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view. (pp. 413-414)

The Chief Justice further noted that the Necessary and Proper Clause was constitutionally “placed among the powers of congress, not among the limitations of those powers” and that “[i]ts terms purport to enlarge, not to diminish the powers vested in the government” (p. 419, p. 420). A strictly literal interpretation that excluded recourse to usage, context, and intent was a “baneful influence” that rendered “the government incompetent to [the attainment of] its great objects” (p. 417, p. 418). Although the powers of government were limited, the Chief Justice observed, a

[S]ound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. (p. 421)

The Chief Justice then concluded with an oft-quoted remark that is attributed to him by subsequent Court opinions, but which really is an almost word-for-word paraphrase of the argument originally used by Alexander Hamilton to the cabinet of President Washington’s first cabinet some 18 years previous.<sup>50</sup>

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. (p. 421)

Having laid the groundwork for the concept of the Constitution as a blueprint for government with implied powers and having justified the idea of a broad construction of the Constitution’s meaning, the Court ruled that the Second Bank of the United States was one of the means by which the federal government chose to enact several constitutionally enumerated

powers, e.g., “to lay and collect taxes; to borrow money; to regulate commerce” (p. 407). As a corollary, the Court also ruled that the branches were constitutional and that having prescribed the bank’s duties through legislation, Congress could constitutionally leave “the selection of places where those branches” should be located to the “bank itself” (p. 425, p. 424).

Regarding the issue of the states being able to tax a federal operation within its boundaries, Chief Justice Marshall observed that the arguments by the bank’s attorneys against the states didn’t rest on a specific constitutional provision. Instead, it rested on a principle that “so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds” (p. 426). And what was this principle upon which the federal government based its argument? According to Marshall, “This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them” (p. 426). Against this position Maryland constructed its argument, that the states “may exercise their acknowledged powers upon [a law of Congress], and that the constitution leaves them this right, in the confidence that they will not abuse it” (pp. 427-428). The Chief Justice noted that the logical outcome of such a position would be to change “totally the character” of the Constitution and would enable states to arrest “all the measures of the government” and prostrate the federal government “at the foot of the states (p. 432). Such a position would contravene the intent of the American people who ratified the Constitution, according to the Court’s opinion.

The American people have declared their constitution and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states.... This was not intended by the American people. They did not design to make their government dependent on the states. (p.432)

In ruling that the Maryland law, which taxed the federal bank, was unconstitutional, the Court dealt with the nullification argument of the states' rights position, implicit in the state's arguments and explicit in the original Kentucky Resolution penned by Thomas Jefferson. Speaking for the entire Court, Chief Justice Marshall declared that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government" (p. 436).

*Concurring/dissenting opinions.*

There were no dissenting opinions.

***Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135 (1892).***

*Location of case previously briefed/summarized.*

This case was summarized under the Guarantee Clause section entitled "The Guarantee Clause Requires Federal Intervention to Secure Protection Against Abusive State Governments." The case summary is located on pages 139-143. Briefly, the case involved an attempt by a losing candidate for governor to oust the duly elected governor of Nebraska from office on the question of citizenship that, in turn, involved a dispute between state and federal jurisdictions.

*Significance for the tenth amendment.*

The interest of *Boyd v. Nebraska ex rel. Thayer* for the Tenth Amendment is Justice Field's dissenting opinion in which he unsuccessfully argued that the Tenth Amendment was a limit on the federal government's ability to intervene in state affairs under the provisions of the Constitution's Guarantee Clause. Justice Field's dissent was based, by implication, on the states' rights theory regarding the origin of government that was disallowed in *McCullough v. Maryland*. Briefly, that theory held that the current constitutional system originated from the

state governments who ceded specific powers to the national government. According to Justice Fields:

They [the states] are qualified sovereignties, possessing only the powers of an independent political organization which are not ceded to the general government or prohibited to them by the Constitution. But, except as such powers are ceded to the general government or prohibited to them, the States are independent political communities. (p. 182)

Opposed to that theory is the idea that triumphed in *McCullough*, that American government flows from the people, not the states. It was the people who determined that power should be divided between the federal and state governments as outlined in the Constitution.

Although receiving judicial sanction in *McCullough*, this concept stemmed from the Framers in the Constitutional Convention. That the Constitution flowed from the people was the primary reason that Madison's Virginia Plan provided for ratification of the new Constitution by "assemblies of Representatives ... expressly chosen by the people" (Farrand, I, p. 22). Madison himself declared this reasoning before the Convention on June 5, 1787, when he stated that "he thought it indispensable that the new Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves" (Farrand, I, p. 123). Madison had earlier observed that the Articles of Confederation "were defective in this respect" because they rested "on the Legislative sanction only" which made it seem "as a Treaty only of a particular sort, among the Governments of Independent States" (Farrand, I, p. 122). The resolution to refer the new Constitution "to the people of the States for ratification" was adopted by the Convention on June 12, 1787 (Farrand, I, p. 214) and thereafter never challenged, the only question being the number of states ratifying that would be sufficient for adoption.

Examining changes made in the preamble during the Convention provides further evidence that the Framers wished the Constitution to be viewed as springing from the people.

On July 26, 1787, the Convention selected a “Committee of Detail” to prepare a draft of the Constitution containing the resolutions that had been approved” (Farrand, II, p. 128; Farrand, III, pp. 64-65). The members, representing the major geographic areas of the country, were John Rutledge from South Carolina (chairman, deep South), Edmund Randolph from Virginia (upper South), James Wilson from Pennsylvania (Middle States), Oliver Ellsworth from Connecticut (lower New England), and Nathaniel Gorham from Massachusetts (the “heart of New England”) (Rossiter, p. 200). The preamble they submitted to the Convention on August 6, 1787, read:

We the people of the States of New Hampshire, Massachusetts, Rhode-  
Island and Providence Plantations, Connecticut, New-York, New-Jersey,  
Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-  
Carolina, and Georgia, do ordain, declare, and establish the following  
Constitution for the Government of Ourselves and our Posterity. (Farrand,  
II, p. 177)

After another month of further deliberation, the Convention appointed a Committee of Style “by Ballot to revise the stile [sic] of and arrange the articles which had been agreed to” (Farrand, II, p. 553). Members included William Johnson of Connecticut (chairman), Alexander Hamilton of New York, James Madison of Virginia, Gouverneur Morris of Pennsylvania, and Rufus King of Massachusetts (Farrand, II, p. 554; Bowen, pp. xviii-xix). As one constitutional historian noted, Gouverneur Morris served as the “penman of the Constitution” (Rossiter, p. 225). According to a fellow committee member, James Madison:

The *finish* given to the style and arrangement of the Constitution fairly  
belongs to the pen of Mr. Morris; the task having, probably, been handed  
over to him by the chairman of the Committee, himself a highly respectable  
member, and with the ready concurrence of the others. A better choice  
could not have been made, as the performance of the task proved. (Farrand,  
III, p. 499)

However, “whether he worked under the gaze of his four colleagues or went at it largely alone, whether the committee kept to itself or accepted help from other delegates – these are questions

to which, alas, we have no answers” (Rossiter, p. 225). More important for our purpose, the finished preamble removed all reference to states. Instead of beginning with, “We the people of the States of ...” as noted previously, the preamble now read:

We the People of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America. (Farrand, II, p. 651)

Given both the final text of the preamble to the Constitution and the actions taken at the Constitutional Convention, the inescapable conclusion is that the people, not the states, are the “real sovereign source of the Constitution” (Rossiter, p. 229; see also Federalist No. 78, pp. 435-436 [Alexander Hamilton]; Corwin, 1965, p. 89; Wills, 1981/2001, pp. 131-134; *McCullough v. Maryland*, 17 U.S. 316 – for Daniel Webster’s arguments, 17 U.S. 316, 326; for William Pinkney’s arguments, see 17 U.S. 316, 377-378; for Chief Justice John Marshall’s opinion, see 17 U.S. 316, 404-405, 432). Premised as it was on the compact theory of the Constitution, Justice Fields’ dissent rested on non-existent constitutional ground.

***Hammer v. Dagenhart, 247 U.S. 251 (1918).***

*Facts & procedural history.*

This case focuses on a dispute between the Commerce Clause and the Tenth Amendment. Technically, legal action was brought in the U.S. District Court for the Western District of North Carolina by a father on behalf of himself and his two minor sons who were employed by a cotton mill in Charlotte, North Carolina. The original case name was *Roland H. Dagenhart, and Reuben Dagenhart and John Dagenhart v. Fidelity Manufacturing Company and William C. Hammer* (Wood, 1968, n. 47, p. 96). The suit sought to enjoin the textile manufacturer, Fidelity Manufacturing, from complying with the provisions of the federal Keating-Owen Child Labor



Act by discharging its child laborers and to permanently enjoin the district attorney, William Hammer, from “enforcing the statute against the company or from instituting proceedings against it” (Wood, 1968, p. 97). Both the House and Senate had passed the Keating-Owen Child Labor Act with large majorities in each legislative chamber favoring the measure. Enacted in 1916 as part of the Progressive movement’s drive to enact “regulatory legislation to ameliorate social problems deemed national in character,” the Child Labor Act barred products manufactured by children from interstate commerce (Hall, 1999, p. 122). Leaving untouched the transportation of such goods within the boundaries of any state, the act defined child labor as labor committed by “children under the age of fourteen” and

children between the ages of fourteen and sixteen years ... permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o’clock P.M. or before the hour of 6 o’clock A.M.  
(p. 269)

Both of the Hammer boys, Reuben and John, fell under the definition of children as defined by the act, one being under the age of fourteen and the other being between the ages of fourteen and sixteen years of age.

In actuality, David Clark, editor of the *Southern Textile Bulletin* and organizer of the Executive Committee of Southern Cotton Manufacturers, engineered the lawsuit. Clark’s father had served as the chief justice of the North Carolina Supreme Court after participating in the Civil War as a colonel in the Confederate Army while his grandfather had served as governor, U.S. senator, and confederate senator from North Carolina in addition to a stint as U.S. Secretary of the Navy (Wood, 1968, pp. 42-44). Described as “a crusty, uncompromising conservative,” Clark later admitted in testimony before a congressional committee that he had prepared the test case in *Hammer v. Dagenhart* because he wanted the Child Labor Act “declared unconstitutional”; he also admitted that he had difficulty finding employees willing to test the

law (Wood, 1968, pp. 94-95). The difficulty was overcome when the company, Fidelity Manufacturing, posted a copy of the statute and listed the employees who would be discharged after August 31 to comply with the act when it became effective on Labor Day, 1917.

The District Court for the Western District of North Carolina ruled that the Child Labor Act was unconstitutional and entered a decree enjoining enforcement of the act in western North Carolina. The judge in the case did not explain his reasons in a written opinion, which was described as “a severe breach of judicial canons for a district judge” (Wood, 1968, p. 105). The lack of a written opinion also meant that no applicable precedents were cited to support the ruling. The Supreme Court agreed to review the case on appeal.

*Legal question.*

“Is it within the authority of Congress in regulating commerce among the States to prohibit the transportation in interstate commerce of manufactured goods” produced in a factory employing legislatively defined children (p. 269)?

*Legal reasoning of opposing parties.*

John W. Davis, U.S. Solicitor General, argued the case for the appellants. Later, as a private attorney for a leading Wall Street firm, he “became a founding member of the anti-New Deal Liberty League in 1934” (Hall, 1992, p. 219). As the lead counsel for the steel industry in 1952, he successfully “challenged the constitutionality of the Truman administration’s seizure of the industry” in *Youngstown Sheet and Tube Co. v. Sawyer* (Hall, 1992, p. 219). Davis also defended school segregation unsuccessfully in *Brown v. Board of Education* and was portrayed by Burt Lancaster in the 1991 movie focusing on the Clarendon County, South Carolina portion of that same ruling, “Separate But Equal.” However, in 1918, Davis led the arguments for the government in defending the constitutionality of the Keating-Owen Child Labor Act. The head

of the Harvard Law School, Roscoe Pound, who had received a special appointment as Assistant Attorney General specifically for this case, assisted Hammer at the district court level, as did Thomas Parkinson who also received a special appointment as Assistant Attorney General upon the urging of the reform groups (Wood, 1968, pp. 100-101). Parkinson had helped draft the Child Labor Act, had made presentations before congressional committees on the topic, and had helped draft the administrative regulations that were needed once the Keating-Owen legislation was passed by Congress. Their arguments were used by Davis in his brief to the Court. William Frierson, already serving as an Assistant Attorney General, participated in the brief as well. No information could be located about Robert Szold, an attorney listed in the court record as assisting with the brief. Davis as Solicitor General conducted the oral arguments before the Court (Wood, 1968, p. 151).

Davis and his team focused on the following points:

- The point at which “the actual transportation begins” is the point at which “the jurisdiction of Congress at once attaches” under the Commerce Clause (p. 252).
- The Child Labor Act distinguished “between the manufacture, which lies within one State, and the interstate movement” (p. 253).
- “No prohibitions are extended to manufacturers of goods as such” by the act. “A manufacturer may, notwithstanding the act, employ such children as he pleases. The law springs into activity only when actual transportation to another State begins” (p. 253).
- “There is no right to use the channels of interstate commerce to affect injuriously the health of the people in competing States; nor to consummate the injury to the producing child; nor in unfair competition” (p. 256).

- “The act is a legitimate exercise of legislative power for the protection of the public health” (p. 256). “Congress acted reasonably in putting child-made goods in the same class” as “liquor, lottery tickets, and misbranded food” (p. 257).
- “Congress was attempting to regulate commerce in good faith... It sought only to prevent the evil resulting from the interstate transportation of child-made goods” (p. 259).
- Congress has discretion under the Commerce Clause “to determine which of the various business elements of the Nation is entitled to protection” (p. 258). It determined that products made by children didn’t deserve the protection offered by interstate commerce.
- “it was not fanciful to class shipment of child-made goods as unfair competition. Fraud and deceit are recognized acts of unfairness. An advantage derived by drawing on the blood of children is also immoral...” (p. 258).

In concluding its arguments, the defense attorneys for the appellant argued that any attempt to invoke the “reserved powers of the States” under the Tenth Amendment was “to beg the question. The reserved powers of the States do not begin until the power of Congress leaves off” (p. 259). Observing that the Child Labor Act did not encroach “upon the reserved powers of the States,” the defense team quoted a Court decision reached in 1913 whereby the principle was established that Congress could prohibit such interstate transportation as was deemed necessary to protect and promote the welfare of the nation:

As said by Mr. Justice McKenna in *Hoke v. United States*<sup>51</sup>, 227 U.S. 308, 320, “The power of Congress under the commerce clause of the Constitution is the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons or States is not material to be considered.” (p. 259)

A team of six attorneys presented written and oral arguments for the appellees. All six lawyers came from the same Wall Street firm, O'Brien, Boardman, Parker, and Fox, a law firm described as "one of the best-known corporate law organizations in the country" that had been retained earlier by Clark to represent the Executive Committee of Southern Cotton Manufacturers (Wood, 1968, p. 85). Morgan J. O'Brien, the law firm's senior partner, was characterized as "one of the select group of business lawyers who argued most of the important litigation heard by the Supreme Court" while another participating partner in the case, Junius Parker, served as general counsel for the American Tobacco Company (Wood, 1968, p. 85). Thus, both the appellant and appellees in *Hammer v. Dagenhart* had top-notch legal representation.

The attorney team for the cotton manufacturers sought to draw a distinction between production and commerce because such a distinction "is still effective to prevent direct congressional regulation of production as distinguished from sale and transportation" (pp. 261-262). They also worked to establish that the actual goods produced were harmless and thus shouldn't be denied the right of interstate commerce as "outlaws of commerce," particularly since it was impossible to detect any difference between goods produced by child labor and those produced by non-child labor (p. 261). Attorneys for the textile manufacturers questioned the ability of Congress to stretch the Commerce Clause to harmless, manufactured goods by asking, "Does the power to regulate commerce extend to and include the power to prohibit harmless and useful commodities because of pre-commerce conditions of labor" (p. 261)? This allowed them to reframe the legal question in terms favorable to a Tenth Amendment defense.

Is the act a regulation of commerce in the constitutional sense? Or is it a regulation of some one of the many internal affairs of the States which Congress is not empowered to deal with.... A regulation of "all of these delicate, multiform and vital interests – interests which in their nature are,

and must be, local in all the details of their successful management.” (p. 260)

Attorneys from the powerful Wall Street firm argued that both the purpose and the effect of the Keating-Owens Child Labor Act were to “prevent the employment of children, and not to safeguard or promote commerce” (p. 261). Power over manufacture was a police power with no specific delegated authority to the federal government in the Constitution and was therefore reserved to the states by the Tenth Amendment.

Whatever menace there is in child labor has a locality.... The menace, if it exists, is confined to where the child is employed. In invoking the police power, Congress is operating outside the domain of interstate commerce. A process of manufacture cannot obstruct or injuriously affect commerce when the product of that process is indistinguishable from the products of other processes. (p. 263)

Furthermore, in direct contradistinction to the Progressive impulse that gave rise to the Keating-Owens Act, the manufacturers’ attorneys stated that child labor did not “taint” the products it produced:

It cannot reasonable and fairly be said that the product of the factory where children are employed is so tainted by its origin that during or after transportation it constitutes a menace to health or morals or to any other subject within the domain of Congress. (p. 263)

Because the Child Labor Act’s intent was to regulate a manufacturing process and not to regulate commerce, it represented more than an abuse of power.

[W]hen power is called into play, not for the purpose for which it was given, but for a covert purpose, it becomes not an abuse of power, but the exercise of an unconferrred power, and the duty is incumbent upon the court to determine this matter.... Covert legislation is legislation whose constitutional support bears no sincere relation to the legislative and popular purpose sought to be attained. (p. 265)

Finally, the attorneys for the textile manufacturers posed a closing question: “Is there a line between ‘the commercial power of the Union and the municipal power of the State?’ Has

Congress absorbed the police power of the States” (p. 268)? The attorney closed their argument by observing, “If Congress has the power here asserted, it is difficult to conceive what is left to the States” (p. 268).

*Holding & disposition.*

In a narrow 5-4 decision the Court held that the Child Labor Act exceeded “the constitutional authority of Congress” under the Commerce Clause and exerted “a power as to a purely local matter to which the federal authority” did not extend as it was reserved to the state under the Tenth Amendment (pp. 276-277). The slim majority thus affirmed the decision of the District Court for the Western District of North Carolina that declared the act unconstitutional. Justice Oliver Wendell Holmes penned a strong dissent that was joined by Justices Brandeis, McKenna, and Clarke.

*Court’s rationale.*

To fully understand the thinking of the five majority justices, one needs to understand the ideological doctrine of laissez-faire constitutionalism. As can be seen in the following description by a professor of public law and legislation, hostility to federal regulatory powers constituted one of the tenets of laissez-faire constitutionalism.

The ideology reflected classical liberal economics, with its commitment to market control of the economy, a preference for entrepreneurial liberty, and a concomitant hostility to governmental regulation; social Darwinism, which extolled competition in the struggle for social existence and survival of the economically fittest; ... traditional American values, including individualism, access to opportunity, and hostility to restraints on competition... (Hall, 1992, p. 492)

Critics of the doctrine included Justice Holmes, Justice Brandeis, Roscoe Pound as Dean of the Harvard Law School, and Theodore Roosevelt, particularly during “his Bull Moose campaign of 1912” (Hall, 1992, p. 493). Described as an ideology that “was only intermittently dominant,”

laissez-faire constitutionalism “led to decisions restrictive of federal regulatory power, including ... the *Child Labor Cases* (*Hammer v. Dagenhart*, 1918, and *Bailey v. Drexel Furniture Co.*, 1922)” (Hall, 1992, p. 492).

In the nontheoretical world of jurisprudence, justices bring mental models to work which guide perceptions, both in terms of what is perceived and how it is perceived. The mental model guiding the majority justices in *Hammer v. Dagenhart* was laissez-faire constitutionalism. Mental models sometimes work to preclude (or enhance, depending on one’s perspective) success in constitutional litigation as demonstrated below:

The really basic question is: what difference [do written briefs and oral advocacy] make? What is the significance or consequence of the role of the lawyer in Supreme Court litigation?

The answer depends very heavily upon the class of cases involved. If the case is in an area in which the Justices have marked opinions to start with, they may be unpersuadable, and in that situation the arguments are unimportant. John P. Frank, *Marble Palace* (New York: Alfred A. Knopf, 1958), p. 97. (Wood, 1968, p. 144)

Supreme Court Justice Robert H. Jackson made a similar point in speaking about the practice of making oral arguments before the Court.

[The period of time in the courtroom] is utterly inadequate to educate an uninformed judge or to overcome old convictions or predilections, or to win a convert to a new position. Success in such an enterprise is apt to be accidental or the result of predetermination. (Jackson, p. 301)

In this particular case, the older doctrine of laissez-faire constitutionalism triumphed over the newer, more recent Progressive Movement doctrine that viewed federal regulation as necessary to provide a level economic playing field and to promote a social policy in which children were allowed to be children and students instead of factory workers.

The majority’s rationale closely followed the arguments presented by the cotton manufacturers’ Wall Street attorneys. First, the majority justices focused on the effect of the



Child Labor Act, the prohibition of child labor. They also drew attention to the fact that the manufactured goods that were being shipped were harmless.

The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. (pp. 271-272)

The Court's majority next stated that while Congress had "ample" power over interstate transportation, "the production of articles, intended for interstate commerce, is a matter of local regulation" (p. 272). After noting that one intent of the law was to reduce the economic advantage enjoyed by manufacturers using lower-priced child labor and thereby promote a fairer form of economic competition, the majority opinion, endorsing a basic tenet of laissez-faire constitutionalism, declared, "There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition" (p. 273). Noting what it perceived to be the limits of the Commerce Clause, the majority opinion next brought the Tenth Amendment into play.

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution. (pp. 273-274)

Having interpreted manufacturing as a local activity to be regulated by the individual states, the majority justices focused on state governments as a primary component of federalism.

The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution. (p. 275)

Building upon its prior reasoning, the Court majority announced its conclusion.

To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States. (p. 276)

*Concurring/dissenting opinions.*

Justice Holmes wrote a scathing dissent with which Justices Brandeis, McKenna, and Clarke concurred. Described by a professor of political science as “one of the most notable dissenting opinions in the Court’s history,” Justice Oliver Wendell Holmes castigated the five majority justices for intruding their personal judgments “upon questions of policy [and] morals” (Hall, 1992, p. 360; 247 U.S. 251, 280). Noting that commerce and national public policy were matters for congressional decision, Justice Holmes declared, “It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary – to say that it is permissible as against strong drink but not as against the product of ruined lives” (p. 280). Noting that civilized countries were more in agreement over the evils of child labor than they were regarding intoxicants, he ironically observed, “I should have thought that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was preëminently a case for upholding the exercise of all its powers by the United States” (p. 280).

Justice Holmes also felt obligated to point out the obvious:

The first step in my argument is to make plain what no one is likely to dispute – that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects and that if invalid it is so only upon some collateral ground. (p. 277)

He continued to explain with simple, declarative sentences that contained no ambiguity and which proceeded in logical order:

The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given the power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something.... So I repeat that this statute in its immediate operation is clearly within the Congress's constitutional power. (pp. 277-278)

And then Justice Holmes proceeded directly to the heart of the cotton manufacturers' and majority justices' mistaken argument, that an "otherwise constitutional power by Congress [could] be pronounced unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which I have admitted that they are free from direct control," namely the question of child labor (p. 278). His sarcasm is reminiscent of Justice Harlan's notable dissents.

I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State. (p. 278)

And then Holmes began to cite and discuss the court cases serving as precedents for the matter at hand: *McCray v. United States*, 195 U.S. 27; *Veazie Bank v. Fenno* 8 Wall.533; *Hipolite Egg Co. v. United States*, 220 U.S. 45; *Weeks v. United States*, 245 U.S. 618; and *Hoke v. United States*, 227 U.S. 308, to mention only a few of the cases cited by Holmes. Then, much like a schoolteacher working with students having difficulty understanding a simple, but abstract concept, Justice Holmes explained the intersection of the Commerce Clause and the Keating-Owen Child Labor Act to the five majority justices.

The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights.... Under the Constitution such commerce belongs not to the States but to congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. (p. 281)

And, like any good teacher would do in similar circumstances, Holmes drew an analogy between something he felt certain the justices understood and the abstract concept not fully understood.

Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. (p. 281)

Justice Holmes concluded his dissent with the following observation:

The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command. (p. 281)

Focusing as Holmes did upon what he viewed as a legitimate application of congressional authority derived from the Commerce Clause, which was substantiated by multiple precedents, Holmes' dissent paved the way for later success in protecting the nation's social and economic welfare through a focus upon using the "channels of commerce to achieve social welfare purposes" (Hall, 1992, p. 217).

***Bailey v. Drexel Furniture Company, 259 U.S. 20 (1922).***

*Case summary.*

The eloquence of Justice Holmes' dissent and the narrowness of the decision's majority in *Dagenhart* combined to affirm, for many people, the wisdom of regulating child labor on a national scale. In many people's minds, the Keating-Owens Child Labor Act was inherently just as well as constitutional. The *Dagenhart* decision "provoked an outpouring of popular demands for new federal child labor legislation" (Wood, 1968, p. 178). Congress responded by enacting a second measure to regulate child labor, in this instance by attaching a rider, the Pomerene amendment, to the Revenue Bill of 1918. The Pomerene amendment incorporated the vast majority of the Keating-Owen Child Labor Act, but replaced reliance on the Commerce Clause

to prohibit interstate commerce with the taxing power of Congress. The Pomerene amendment levied a tax of ten cents per dollar of net profits received by manufacturers who violated the child labor provisions, thus greatly reducing the economic incentive to use lower-priced child labor. The Pomerene amendment differed from the Keating-Owen Act in another important aspect as well. It was much more comprehensive in scope, applying child labor standards to every “mine, mill, cannery, workshop, factory or manufacturing establishment” in the United States (Wood, 1968, p. 203).

The child labor amendment passed by overwhelming majorities in both houses, 50-12 in the Senate and 312-11 in the House. Southerners cast eleven of the negative Senate votes with eight of those coming from the four “principal cotton textile manufacturing states – North Carolina, South Carolina, Georgia, and Alabama” (Wood, 1968, p. 205). Unlike the previous Keating-Owen Child Labor Act, no significant northern Senate votes were cast against the measure, the lone vote coming from a Colorado senator who “reflected the Colorado sugar beet raisers' economic stake in thousands of agricultural child workers” (Wood, 1968, p. 206). Senators absent from the vote because of starting their Christmas vacation early (the Senate vote took place on December 18, 1918) had announced their intention to support the Pomerene amendment (Wood, 1968, pp. 205-206). The vote in the House of Representatives took place February 8, 1919 with the only negative votes being cast by southerners. The amendment took effect on April 25, 1919 (Wood, 1968, pp. 215-216).

Clark and the Executive Committee of Southern Cotton Manufacturers searched for a likely candidate to provide a test case that would challenge the constitutionality of the Child Labor Tax Act. Clark, in particular, did not want to go outside the friendly confines of the federal Western District of North Carolina; however, all of the textile plants had either paid the

tax without protest or had abandoned the practice of using child labor (Wood, 1968, p. 260).

Using information obtained from J.W. Bailey, the Collector of Internal Revenue for the District of North Carolina, Clark obtained a list of assessments for other manufacturers in the Western District and approached them, striking a responsive chord with officials of the Drexel Furniture Company, described as “representative of another southern industry that general resisted progressive economic reforms” (Wood, 1968, p. 260).

Meanwhile, the U.S. Attorney General’s office also desired a test case to establish the constitutionality of the Child Labor Tax Act and remove any doubt about the act’s legitimacy. However, James M. Beck had replaced Davis upon his resignation as the Solicitor General. The Solicitor General’s office and the Executive Committee’s attorneys communicated and worked with each other to establish and bring forward a test case as quickly as possible. The Solicitor General, in turn, communicated with the federal district attorney’s office in North Carolina as well as with the internal revenue office in Raleigh, North Carolina to ensure an expeditious handling of the case that involved priority treatment and no delays on the federal government’s part (Wood, 1968, pp. 261-265). Drexel Furniture Company paid the tax under protest and then initiated proceedings in U.S. District Court for the Western District of North Carolina in Greensboro to recover the amount paid for the contested tax. After the judge ordered Bailey, the internal revenue officer for North Carolina, to appear in court to answer the charges, the federal district attorney “filed a demurrer contending that the child labor tax was constitutional” (Wood, 1968, p. 264). After argument, the federal judge dismissed the demurrer and ruled that the Child Labor Tax Act was unconstitutional as a violation of the Tenth Amendment as determined in the *Dagenhart* case. Subsequent activity was both described and characterized by a political historian:

After receiving Judge Boyd's ruling, District Attorney Linney filed an assignment of errors; then he requested and was granted a writ for appeal. The entire performance was well-nigh perfunctory, as if the legal drama had been repeatedly rehearsed, as in fact it had. Everyone concerned with the litigation anticipated a negative holding... (Wood, 1968, p. 265)

Two critical differences differentiated how the Supreme Court would hear this case.

Former President William Howard Taft now served as the Chief Justice. His views, based upon his writings and speeches, were summarized:

For Taft, judicial review was the fundamental institution of American government, distinguishing it from other democratic societies. Its purpose was to ensure considered public action, to restrain popular passions, and to impose strict prohibitions upon political interference in social and economic affairs in order to protect personal liberty and the fundamental rights of property. These freedoms, he deeply believed, were indispensable to the existence and progress of society. (Wood, 1968, p. 259)

In other words, Taft was a fervent believer in and articulate spokesman for laissez-faire constitutionalism. As Chief Justice he worked hard (and effectively, as we will soon see) to overcome the "serious divisions" that existed on the Court he inherited as Chief Justice by moderating conflict and by massing individual justices behind the majority decision.

Beyond all else, he sought to recreate the conception of a tribunal that spoke decisively upon the constitutional questions that came before it. His purpose was to strengthen judicial review and to put the Court beyond popular control and above criticism. (Wood, 1968, p. 259)

The other critical difference involved the new Solicitor General who replaced Davis. First, James M. Beck had much less experience arguing cases before the Supreme Court. More importantly, he was opposed to federal regulation of child labor because, as he wrote previously in a journal article entitled "Nullification by Indirection," regulating child labor was "a subject beyond question exclusively within the police power of the state" (Wood, 1968, pp. 269). Described as having "heartily approved the *Dagenhart* decision" and as being "thoroughly convinced of the unconstitutionality of the child labor tax," he was now confronted with having

to argue its constitutionality (Wood, 1968, pp. 269, 268). Furthermore, three weeks before *Drexel* was to be argued, Beck observed to the St. Louis Bar Association “that if the courts continued to sustain congressional taxation without inquiry into motive, ‘little will be left of the rights of the State’” (Wood, 1968, p. 269). “Propriety dictated that Beck choose one of two alternatives: submerge his personal convictions and present a wholehearted defense of the legislation entrusted to his care or acknowledge its irremedial defects despite the political hazards” (Wood, 1968, p. 268). Beck chose neither of the alternatives. Two historians, substantiated (in this writer’s opinion) by a careful reading of the case and comparison with arguments used in *Dagenhart*, reached similar conclusions. Professor Stephen B. Wood, citing Morton Keller’s *In Defense of Yesterday: James M. Beck and the Politics of Conservatism* published in 1958 by Coward-McCann with which he agreed, described Beck’s course of action.

To resolve his dilemma, he tried to give his brief and oral advocacy the appearance of an energetic defense while, in fact, he contrived a self-defeating argument, one deliberately calculated to destroy rather than preserve the statute. He could not escape from his past and his conservative convictions. (Wood, 1968, pp. 268-269)

How exactly did this happen?

In form, his brief was a strong argument for legislative supremacy and against judicial supervision.... But Beck drastically overstated the argument and presented a sweeping conception of congressional power, one almost certain to antagonize the judicial mind. Indeed, he virtually challenged the Court to override the principle of judicial impotence. At the same time, he repeatedly undercut the child labor tax with numerous candid admissions that it carried far – clearly beyond political limitations, and in effect beyond constitutional ones. (Wood, 1968, pp. 269-270)

By contrast, the brief by the Wall Street attorneys retained by the Executive Committee of Southern Cotton Manufacturers “was characterized by vigorous but restrained advocacy. It ... incorporated long passages from the *Dagenhart* brief” (Wood, 1968, p. 271).



Chief Justice Taft delivered the Court's opinion. After reviewing the procedural facts of the case, Taft summarized the two positions:

The law is attacked on the ground that it is a regulation of the employment of child labor in the States – an exclusively state function under the Federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by § 8, Article I, of the Federal Constitution. (p. 36)

The legal questions raised by the two positions were: first, “Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve;” and second, “Or does it regulate by the use of the so-called tax as a penalty” (p. 36)? Without using the term, Taft observed that the legal issues centered on federalism. “In the maintenance of local self government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half” (p. 37). Examining the intersection of the congressional action and the Tenth Amendment, Taft declared:

But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. (pp. 37-38)

Taft concluded, “To give such magic to the word ‘tax’ would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States” (p. 38).

Next, Taft tried to articulate the difference between a tax and a penalty, which he admitted was “difficult to define” (p. 38). Nevertheless, Taft proceeded with an attempt to distinguish the current case from the precedents whereby the Court “had legitimated using the

taxing power for regulatory purposes” (Hall, 1992, p. 56). The most notable precedents were *McCray v. United States*, 195 U.S. 27, which upheld a special tax on oleomargarine as “a substitute for butter;” *United States v. Doremus*, 249 U.S. 86, which upheld “a special tax on the manufacture, importation and sale or gift of opium or coca leaves or their compounds or derivatives;” and *Veazie Bank v. Fenno*, 75 U.S. 533, in which the Court upheld a special tax imposed on “circulating notes of persons and state banks” in order to help control the national currency as well as raise money to finance the costs of the Civil War (pp. 40, 42-43). Judicial legitimacy, like beauty, lies in the eye of the beholder. Taxes imposed on “subjects ... with the incidental motive of discouraging them by making their continuance onerous ... do not lose their character as taxes because of the incidental motive” (p. 38). “But,” Taft continued, “there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment” (p. 38). The criteria to judge the point at which a tax law crosses the line between legitimacy and illegitimacy was left vague, other than the suggestion that its “prohibitory and regulatory effect and purpose are palpable” (p. 37).

Announcing the Court’s first finding, Taft declared, “The case before us can not be distinguished from that of *Hammer v. Dagenhart*, 247 U.S. 251.... This court held the law in that case to be void” (p. 39). Taft found that “the necessary effect” of the act being challenged was “to regulate the hours of labor of children in factories and mines within the States, a purely state authority” (p. 39). Taft further noted that “the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution” (pp. 39). The Court affirmed the judgment of

the U.S. District Court for the Western District of North Carolina and declared “the Child Labor Tax Law invalid” (p. 44).

*Significance for the tenth amendment.*

The decision in *Bailey v. Drexel Furniture Company*, the second of the Child Labor Cases, was one of the “decisions restrictive of federal regulatory power” that flowed from the mental model formed by the ideology of laissez-faire constitutionalism (Hall, 1992, p. 493; see also previous discussion in this paper of “Court’s Rationale” in *Hammer v. Dagenhart*, pp. 372-373). It would hold sway for two more decades before being overcome. Federal regulation to protect and preserve the nation’s economic and social welfare, part of the mental model of the Progressive Movement, would require more adaptive work in terms of changing beliefs and attitudes before it would triumph over laissez-faire constitutionalism. The current mental model, focused upon the welfare of business, which enjoyed success in this case, derived legal sanction from the Tenth Amendment while the alternative mental model, springing forth as part of the Progressive Movement that focused upon people’s social and economic welfare, would, in the future, abandon reliance upon federal taxing authority and would cite the Commerce Clause for legal authority, thus following the pathway illuminated by Justice Holmes’ dissent in *Hammer v. Dagenhart*, 247 U.S. 251 (see previous discussion of this case). It would take a world-wide depression for the Progressive Movement’s mental model to be incorporated by the New Deal and eventually gain acceptance by all three branches of government.

***United States v. Darby Lumber Company, 312 U.S. 100 (1941).***

*Facts & procedural history.*

Congress passed the Fair Labor Standards Act in 1938 as “the last major piece of New Deal legislation” (Hall, 1992, p. 217). Using its powers under the Commerce Clause to regulate

interstate commerce, Congress established “minimum wages and maximum hours” for workers “engaged in the production of goods for interstate commerce” (p. 100). The maximum hours provision established “forty-one hours a week” as the point beyond which “increased compensation for overtime” became effective while the minimum wage provision provided that workers would be paid at least “25¢ per hour” of work (p. 110). The Fair Labor Standards Act established fines and/or imprisonment for employers who violated the wage and hours provisions, who shipped goods across state lines that were produced in violation of the wage and hours requirements, and who failed to keep records documenting the wages and hours of each employee.

Darby operated a lumber mill in Georgia that purchased raw timber and turned it “into finished lumber with the intent ... to ship it in interstate commerce to customers outside the state” (p. 111). The indictment submitted to the “federal district court for southern Georgia” charged Darby with paying workers less than the minimum wage, not paying overtime wages for hours worked beyond the maximum amount, with violating the interstate commerce provisions for goods produced under conditions that violated the wages and hours provisions, and with “failure to keep records showing the hours worked each day a week by each of his employees” (pp. 108 & 111).

Darby’s legal counsel filed a demurrer that challenged the Act’s validity because it exceeded powers granted by the Commerce Clause and because it violated rights guaranteed under “the Fifth and Tenth Amendments” (p. 111). The district court’s ruling (32 F.Supp. 734) declared the Fair Labor Standards Act to be unconstitutional because it regulated the manufacture of goods “within the states” which was not “interstate commerce” (p. 111). The district court also ruled that the Act’s regulation of wages and hours was “not within the

congressional power to regulate interstate commerce” (p. 112). Acting on the demurrer filed by Darby, the “district court quashed the indictment in its entirety” (p. 111). The federal government appealed directly to the Supreme Court “under § 238 of the Judicial Code” which authorized direct appeals to the Court “when the judgment sustaining the demurrer ‘is based upon the invalidity or construction of the statute upon which the indictment is founded’” (pp. 108 & 109). The Court granted the appeal “under the Criminal Appeals Act, from a judgment quashing an indictment” (p. 101).

*Legal questions.*

First, does Congress have “constitutional power” to prohibit from interstate commerce goods produced under conditions violating the wage and hours provisions of the Fair Labor Standards Act (p. 108)? Second, does Congress have legitimate authority to set minimum wage and maximum hours provisions for workers engaged in manufacturing goods intended for interstate commerce? Third, in relation to the previous prohibitions, does Congress have the power to require employers “to keep records showing the hours worked each day and week by each of his employees” (p. 108)?

*Legal reasoning of opposing parties.*

The Solicitor General and the Assistant Attorney General, assisted by six other individuals, made the arguments that asserted the constitutionality of the Fair Labor Standards Act. The arguments closely resembled the arguments made in *Hammer v. Dagenhart* almost two decades previously, e.g., firms with “lower labor standards possess an unfair advantage in interstate competition,” the legislation derives its authority from the Commerce Clause, the power of Congress over interstate commerce is not “limited to articles in themselves harmful or deleterious,” and that the commerce power “is measured by what it regulates, not by what it

affects” (pp. 102 & 103). As previously in *Hammer v. Dagenhart*, government attorneys noted the inapplicability of the Tenth Amendment. “The Tenth Amendment merely reserves to the States ‘the powers not delegated to the United States.’ That it is not a limitation upon the exercise of the powers which are delegated to the Federal Government is confirmed by the history of its adoption” (p. 104).

New arguments, however, were made as well. Under the Commerce Clause, states are prohibited “from forbidding importation of goods produced under substandard conditions;” conversely, “The commerce clause was designed to empower the national government to deal with such problems” (p. 102). Unlike *Hammer v. Dagenhart*, no attempts were made to distinguish between commerce and manufacture. Instead appellant attorneys noted the changed meaning of the word, commerce. “Lexicographers, economists, and authors used the term ‘commerce’ to refer not only to the narrow concept of sale or exchange, but to include the entire moneyed economy, embracing production and manufacturing as well as exchange” (p. 103). Also new to the arguments made for the constitutionality of an act using the Commerce Clause to regulate labor conditions was the assertion that *Hammer v. Dagenhart* had “been repudiated by subsequent decisions of this Court” (p. 103). Cited cases included *Shreveport Case* which held that “intrastate acts lie within the power of Congress when necessary effectively to control interstate transactions, and Congress need not wait until transportation commences in its effort to protect the flow of commerce;” and the *Labor Board Cases* “because Congress found that [a provision of the Fair Labor Standards Act] will diminish the obstructions to interstate commerce which flow from labor disputes” (p. 104). Attorneys concluded with the flat assertion, “The Act does not violate the Fifth Amendment” (p. 104). The Court’s record doesn’t contain evidence that the government substantiated that declaration beyond the mere statement.

No new arguments were introduced by the attorney for Darby, the appellee in the case. The same arguments, which had proven successful in *Hammer v. Dagenhart* and *Bailey v. Drexel Furniture Company*, were employed once again. And, why not? Those arguments had also proven successful in striking down a multitude of New Deal congressional acts that were predicated on the belief that “the commerce power granted Congress extensive authority to regulate labor relations, commercial activities, agriculture and the like” (Hall, 1992, p. 128). Decisions striking down key provisions of the New Deal program designed to facilitate the economic recovery of the country’s economy included *Schechter Poultry Corp. v. United States*, a 1935 decision that invalidated the New Deal’s National Industrial Recovery Act by ruling that the poultry codes drawn up under the NIRA regulated local transactions not subject to congressional control of interstate commerce (in addition to ruling that Congress had unconstitutionally delegated legislative authority to the president); *United States v. Butler*, a 1936 decision that struck down the New Deal’s agricultural production control program established by the Agricultural Adjustment Act; *Carter v. Carter Coal Company*, an another 1936 decision that voided the New Deal’s attempts to regulate mining under the Commerce Clause through the National Bituminous Coal Act; and *Morehead v. New York ex rel. Tipaldo*, yet another 1936 Court ruling that invalidated New York’s efforts to establish a minimum wage for women and children. The latter ruling, while having a possible impact on the Fair Labor Standards Act’s attempt to establish minimum wages, was based primarily on the Contract Clause as well as due process rights under the Fourteenth Amendment. Yet the case was a success for laissez-faire constitutionalism, as were the others previously cited, in keeping the government from interfering with capitalism and the sacrosanct, yet invisible, hand of the market (see pp. 372-373 of this paper). The doctrine of laissez-faire constitutionalism, employed by the

Court majorities in cases subsequent to *Hammer v. Dagenhart*, but prior to *United States v. Darby*, effectively gutted the New Deal's economic program. As a result, no reason existed to change arguments that had a proven track record of success, no reason except for two possibly dangerous storm clouds on the horizon – *West Coast Hotel Co. v. Parrish*, a 1937 decision upholding a Washington minimum wage law for women “that was almost identical to the one struck down the previous year” in *Morehead*, and *NLRB v. Jones & Laughlin Steel Corp.*, a 1937 decision upholding the constitutionality of the National Labor Relations Act (NLRA), legislation that used the commerce power to guarantee workers the right to unionize and to prohibit companies from subsequently discriminating against union employees (Hall, 1992, p. 204). Still, these seemed to not deal directly with the issues in the Fair Labor Standards Act, reasonably considered to be controlled by the Court's precedent established in *Hammer v. Dagenhart*.

Archibald B. Lovett, arguing the case for *Darby*, opened by noting the Fair Labor Standards Act attempted to regulate manufacturing which had previously been prohibited, thus alluding to the Act as an infringement upon the state's police powers, which had not been expressly delegated and were consequently reserved to the states by the Tenth Amendment. Lovett then cited the *Hammer v. Dagenhart* and *Bailey v. Drexel Furniture Co.* rulings indicating that “[a] prohibition of shipment in interstate commerce is not necessarily within the congressional power” (p. 105). The argument wasn't different from that used by attorneys in *Hammer v. Dagenhart*, but the citations were. Next, Lovett pointed to the distinction between harmful and useful products, noting that prohibiting harmful products from interstate commerce “does not infringe upon, but supplements, the powers of the” state governments in contrast to prohibitions against useful products which did “unequally” affect the states (p. 105). Lovett used updated citations to assert that “Congressional power over intrastate commerce is limited to”



those “intrastate activities which directly affect interstate commerce,” the new citations being the relatively recent *Schechter* and *Carter* decisions. Lovett also used *Schechter* to re-frame the federal government’s position as an attack upon federalism that was “established by the Constitution” (p. 107).

In a somewhat different tact, Lovett also utilized a propaganda technique, that of reasoning from a false premise, with the premise being that the government was arguing for an open-ended grant of legislative power under Article I, § 8 of the Constitution: “The proposition that every conceivable legislative power is conferred by § 8 of Article I of the Constitution is in direct conflict with the doctrine that the Federal Government is a government of enumerated powers” (p. 106). Lovett immediately followed that argument with a Tenth Amendment assertion of reserved powers. Responding to the Government’s argument that the Commerce Clause prevented state governments from acting to prevent the importation of products from other states, Lovett asserted that such a fact did not act “to vest in the national government unqualified power to regulate competition in those interstate markets” (p. 107). Lovett also employed the “false claim” technique in arguing that the “power to control the conditions of production” was also “the power to impose the standard of living of one section of the country upon another” (p. 107). Finally, Lovett concluded with Fifth Amendment arguments, that the Fair Labor Standards Act deprived his client of “liberty and property without due process of law, and of the freedom of contract guaranteed by the Fifth Amendment,” concluding that the Act was “arbitrary and capricious” (p. 108).

*Holding & disposition.*

In answer to the first legal question, the Court stated, “[W]e conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is

within the constitutional authority of Congress” (p. 115). Regarding the second question, in connecting wage and hours requirements to interstate commerce, Congress made a “legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control” (p. 115). According to the Court, “Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause” (p. 115). In answering the third legal question regarding the Act’s requirements of employer records for employee wages and hours, the Court noted, “These requirements are incidental to those for the prescribed wages and hours, and hence validity of the former turns on validity of the latter” (pp. 124-125). The Court concluded:

Since, as we have held, Congress may require production for interstate commerce to conform to those conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. (p. 125)

As might be surmised from the previous holdings in this case, the Court overruled *Hammer v. Dagenhart*, 247 U.S. 251. Immediately preceding its ruling, the Court observed, “The conclusion is inescapable that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted” (pp. 116-117).

*Court’s rationale.*

In reviewing the facts of the case, the Court noted the Act’s purpose, included in the text of the Act as a congressional “declaration of policy,” which established a nexus between commerce and workers’ well-being (p. 109). According to the Court, the Fair Labor Standard Act’s purpose was:

to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. (pp. 109-110)

Prior to reaching its holding in answering the first legal question, whether Congress had authority to prohibit goods from interstate commerce whose manufacture violated the Fair Labor Standards Act's requirements, the Court asserted, "The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons v. Ogden, supra*, 196" (p. 114). Citing *Hoke v. United States*, among others, the Court observed:

Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. (p. 114)

Continuing its line of reasoning, the Court next dealt with appellee arguments regarding the Act's alleged infringement of the police power of the states.

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination... It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. (p. 114)

Drawing implicit attention to the doctrine of Separation of Powers embedded in the Constitution, the Court drew upon the following precedents (p. 115):

- “‘The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power.’ *Veazie Bank v. Fenno*, 8 Wall. 533.”
- “The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. *McCray v. United States*, 195 U.S. 27.”

Immediately preceding the announcement of its first holding, the Court declared, “Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause” (p. 115).

After holding that Congress did possess authority to prohibit substandard goods from interstate commerce, the Court next proceeded to address the Court’s former ruling in *Hammer v. Dagenhart*, first drawing attention to Justice Holmes’ dissenting opinion in that case.

In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. (pp. 115-116)

The Court then noted the conflict posed by the majority opinion’s opposition [in *Hammer*] to both Holmes’s dissent and the Court’s first holding in *Darby*:

The reasoning and conclusion of the Court’s opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution. (p. 116)

Confronting the distinction between “harmful” and “useful” as applied to interstate commerce, the Court characterized it as “a distinction which was novel when made and unsupported by any provision of the Constitution” (p. 116).

After announcing that *Hammer v. Dagenhart* was overruled, the Court addressed the issues of the second legal question, whether or not Congress had authority to set production standards for goods in interstate commerce. The Court rephrased the question to consider whether the “prescribed labor standards, of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it” (p. 117). Addressing that issue, the Court noted that the Act’s purpose “was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it” (p. 117). And then the Court drew on the observation, first made by Alexander Hamilton in 1791 (see p. 312 of this paper) and subsequently articulated almost three decades later by Chief Justice Marshall in *McCulloch v. Maryland* (see p. 360 of this paper) regarding means to legitimate ends where a nexus between ends and means can be made:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch v. Maryland*, 4 Wheat. 316, 421. (pp. 118-119)

After spending time discussing other aspects and precedents upholding other activities with “a substantial effect on interstate commerce” (p. 119), the Court (150 years after Hamilton first stated its legal conceptualization) reiterated its previous point regarding means and legitimate ends:

Congress ... may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power ... when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. (p. 121)

While acknowledging the legitimacy of implied powers through the recognition of means being employed for the achievement of a legitimate power of government, the Court also recognized that Tenth Amendment arguments would not be applicable because “the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end” (p. 124). According to the Court:

The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. (p. 124)

The Court also summarily dismissed as inapplicable the Fifth Amendment protection sought by Darby’s attorney:

Since our decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. (p. 125)

*Concurring/dissenting opinions.*

The decision in *United States v. Darby Lumber Company* was unanimous, the only opinion being the Court’s official opinion written by Justice Harlan Fiske Stone before he became the Chief Justice.

***National League of Cities v. Usery, 426 U.S. 833 (1976).***

*Case summary.*

Beginning in 1961 Congress initiated a series of amendments to the Fair Labor Standards Acts to expand the Act's coverage of types of workers. Amendments in 1961 "extended its coverage to persons who were employed in 'enterprises' engaged in commerce or in the production of goods for commerce" (p. 837). Exemptions had been provided "to the States and their political subdivisions" in the original Act and were maintained in the 1961 amendment to that act (p. 837). However, in 1966 Congress reduced these exemptions as it again amended the FLSA to include "employees of state hospitals, institutions, and schools" (p. 838). When challenged, the Court upheld "the validity of the combined effect of these two amendments in *Maryland v. Wirtz*, 392 U.S. 183 (1968)" (p. 838).

In 1974 Congress again amended the Fair Labor Standards Act, this time by removing all exemptions still remaining for states and their political subdivisions. Exemptions were removed through the Act's definition of "public agency," which was defined to include "the government of a State or political subdivision; any agency of ... a State, or a political subdivision of a State" (p. 838). As described by the Court, the amended Act imposed "upon almost all public employment the minimum wage and maximum hour requirements previously restricted to employees engaged in interstate commerce" (p. 839).

The National League of Cities, the National Governors' Conference, 19 states (including Iowa), and four municipalities joined in a suit filed in the U.S. District Court for the District of Columbia seeking "both declaratory and injunctive relief against the amendments' application to them" (pp. 836-837, 839).<sup>52</sup> In a separate action (consolidated with the *National League of Cities et al* suit upon appeal), the State of California filed a separate suit (*California v. Usery*,

*Secretary of Labor*) to seek federal court relief from the 1974 amendments to the FLSA (p. 837). The District Court for the District of Columbia “granted appellee Secretary of Labor’s motion to dismiss the complaint for failure to state a claim upon which relief might be granted” (p. 839). In its opinion, the three-judge District Court stated, “[A]s a Federal district court we feel obliged to apply the Wirtz opinion as it stands” (*National League of Cities v. Brennan*, 406 F. Supp. 826, 828 {DC 1974}; cited on p. 839). The Court granted appeal and first heard arguments on April 16, 1975. The case was subsequently reargued March 2, 1976.

Justice Rehnquist wrote and delivered the Court’s 5-4 opinion, which was joined by Chief Justice Burger as well as Justices Stewart, Powell, and Blackmun. Justice Blackmun also wrote a separate concurring opinion. Justice Brennan wrote a dissenting opinion that was joined by Justices White and Marshall. Justice Stevens filed a separate dissenting opinion. In a narrowly held opinion, the Court overruled *Maryland v. Wirtz*. The slim 5-4 majority also invalidated the 1974 amendments to the Fair Labor Standards Act “insofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions” because “they are not within the authority granted Congress by Art. I, § 8, cl. 3” (p. 852).

According to Rehnquist’s opinion, the challenge was not to congressional authority to regulate commerce, but to the 1974 amendments extending the reach of the FLSA to state employees.

Appellants in no way challenge these decisions establishing the breadth of authority granted Congress under the commerce power. Their contention, on the contrary, is that when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitutions. (p. 841)



The majority opinion then provided two recent examples of constitutional limitations upheld by the Court, the Sixth Amendment's right to trial by jury in *United States v. Jackson*, 390 U.S. 570 (1968) and the Fifth Amendment's Due Process Clause in *Leary v. United States*, 395 U.S. 6 (1969). According to Rehnquist, the cities and states were contending "that the 1974 amendments to the Act ... encounter a similar constitutional barrier because they are to be applied directly to the States and subdivisions of States as employers" (p. 841). Rehnquist next declared, "This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution" (p. 842). After referring to the Court's assurance in the *Wirtz* decision, which declared that the Court possessed "ample power to prevent ... 'the utter destruction of the State as a sovereign political entity,'" Rehnquist focused attention upon the Tenth Amendment as a limitation upon congressional authority (p. 842). In particular, Rehnquist noted the Court's clarification in *Fry v. United States* (1975) of the statement made in *Darby* regarding the Tenth Amendment.

While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," *United States v. Darby*, 312 U.S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. 421 U.S., at 547 n. 7 (pp. 842-843)

Wishing to connect recent rulings "recognizing the essential role of the States in our federal system of government" with "earlier decisions of this Court," Rehnquist cited dicta from "*Texas v. White*, 7 Wall. 700, 725 (1869), [which] declared that '[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States'" (p. 844). Ironically, the subject matter of *Texas v. White* contradicted Rehnquist's point as the Court in that case upheld

the federal government's use of the Guarantee Clause to override state actions and restore the State to its proper constitutional relations with the Union (*Texas v. White*, 74 U.S. 709, 727-728 (1869); see also pp. 118-119 of this paper).

Apparently the Solicitor General, in presenting the Government's case, had argued that the cases in which this Court has upheld sweeping exercises of authority by Congress, even though those exercises pre-empted state regulation of the private sector, have already curtailed the sovereignty of the States quite as much as the 1974 amendments to the Fair Labor Standards Act.<sup>53</sup> (pp. 844-845)

Justice Rehnquist didn't directly note those precedents, which must have been cited by the Solicitor General in his arguments, nor did Rehnquist address them in the remainder of his opinion. These precedents were neither cited nor discussed until Justice Brennan focused upon them in his dissenting opinion (see 426 U.S. 833, 857-880; also, pp. 412-418 of this paper). Instead of addressing the precedents presented by the Solicitor General in argumentation, Rehnquist dismissed them with a simple declaration, "We do not agree" (p. 845). He continued:

It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. (p. 845)

And then, Rehnquist offered a novel explanation of the intersection of a constitutionally granted power (the Commerce Clause) with the Tenth Amendment which ignored the fact that the Tenth Amendment didn't apply by virtue of the states having delegated the power to regulate commerce to the federal government, that as a result of that delegation, the phrase, "powers not delegated ... are reserved," of that amendment was not applicable (Farrand, IV, p. 95).

We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative

authority to reach the matter, but *because the Constitution prohibits it from exercising the authority in that manner*. (Emphasis added) (p. 845)

After noting that an “undoubted attribute of state sovereignty [was] the States’ power to determine the wages which shall be paid to those whom they employ,” Rehnquist framed, for the first time in the Court’s report of the case, the legal question to be addressed (p. 845).

The question we must resolve here, then, is whether these determinations [for wages] are “functions essential to separate and independent existence,” [Coyle v. Oklahoma, 221 U.S. 559 (1911)] at 580, quoting from *Lane County v. Oregon*, [7 Wall. 71 (1869)], at 76, so that Congress may not abrogate the States’ otherwise plenary authority to make them. (pp. 845-846)

Rehnquist proceeded next to examine the “substantial costs which will be imposed upon [states and cities] by the 1974 amendments” (p. 846). Costs examined by Rehnquist included financial amounts as well as “forced relinquishment of important governmental activities,” e.g., shortened training programs for law enforcement, access to training programs through affirmative action, possible involvement of volunteer fire departments under the new amendments, and reduced fire and police protection services (p. 847). Completing his review of the additional costs to the states and cities required by the 1974 amendments to the Fair Labor Standards Act, Rehnquist concluded that “the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require” (p. 847). Rehnquist further stated:

The only “discretion” left to [the States] is either to attempt to increase their revenue to meet the additional financial burden imposed upon them ..., or to reduce that complement [of employees] to a number which can be paid the federal minimum wage without increasing revenue. (p. 848).

Observing that some might have trouble distinguishing between “private employers” and public employers, i.e., state and municipal governments, Rehnquist declared there was, in fact, a difference (p. 848). He explained:

The difference, however, is that a State is not merely a factor in the “shifting economic arrangements” of the private sector of the economy, *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring), but is itself a coordinate element in the system established by the Framers for governing our Federal Union. (p. 849)

Rehnquist continued. “The degree to which the FLSA amendments would interfere with traditional aspects of state sovereignty can be seen even more clearly upon examining the overtime requirements of the Act” (p. 849). According to Rehnquist, the Act would

have the effect of coercing the States to structure work periods in some employment areas, such as police and fire protection, in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation. (p. 850)

Seeking to further buttress his argument, Rehnquist employed the “Sacred Cow” technique by discussing the danger posed to “volunteer firemen, a source of manpower crucial to many of our smaller towns’ existence” by the 1974 amendments (p. 850).<sup>54</sup> Besides possibly infringing upon state sovereignty, the amendments threatened traditional values as well. According to Rehnquist, “It goes without saying that provisions such as these contemplate a significant reduction of traditional volunteer assistance which has been in the past drawn on to complement the operation of many local governmental functions” (pp. 850-851). Rehnquist concluded:

Our examination of the effect of the 1974 amendments, as sought to be extended to the States and their political subdivisions, satisfies us that both the minimum wage and the maximum hour provisions will impermissibly interfere with the integral governmental functions of these bodies. (p. 851)

Furthermore, the application” of the 1974 amendments would act to “significantly alter or displace the States’ abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation” (p. 851). The afore-mentioned activities “are typical of those performed by state and local governments” and are “functions,” both for “which governments are created to provide” and “which the States have

traditionally afforded their citizens” (p. 851). And, continued Rehnquist, Congress has threatened the very existence of states as independent entities.

If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States’ “separate and independent existence.” *Coyle*, 221 U.S., at 580. (p. 851)

The major factor, according to Rehnquist, doesn’t involve the possibility that “appellants may have overestimated the effect which the Act will have upon their current levels and patterns of governmental activities” (pp. 851-852). According to Rehnquist’s thinking:

[T]he dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States’ “ability to function effectively in a federal system,” *Fry*, 421 U.S., at 547 n. 7. (p. 852)

Rehnquist then announced the verdict reached by five of the Court’s nine justices:

This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3. (p. 852)

In a footnote at the end of his announcement of the 5-4 majority’s holding, Rehnquist offered the following disclaimer:

We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment. (p. 852, n. 17)

Readers, as well as this writer, may wonder why the distinction between specific delegated powers granted the federal government. If the arguments put forth by the majority opinion are

valid constructions of the proposition that delegated powers can be limited by the Tenth Amendment, one struggles to reason why that proposition would apply to the Commerce Clause, but not to the clause that permits Congress to implement the provisions of the Fourteenth Amendment, particularly as that clause specifically allowed a federal override of any state sovereignty concerns regarding the content of the Fourteenth Amendment.<sup>55</sup>

Prior to officially stating that the District Court decisions were reversed (both in the District of Columbia and California), Rehnquist addressed the *Wirtz* decision upon which the lower courts had based their rulings. After observing that “the reasoning in *Wirtz*” was no longer “regarded as authoritative,” Rehnquist returned to his essential theme, that “Congress may not exercise that power [to regulate commerce] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made” (pp. 854, 855). Rehnquist continued:

While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled. (p. 855)

Rehnquist concluded the opinion by declaring, “The judgment of the District Court is accordingly reversed, and the cases are remanded for further proceedings consistent with this opinion” (p. 856).

Neither Justice Brennan nor Justices White, Marshall, and Stevens agreed with the proposition contained within the majority opinion, which was that the Tenth Amendment could act to limit the application of a constitutionally delegated power. Justice Brennan wrote a lengthy dissent, which was joined by Justices White and Marshall, while Justice Stevens delivered a briefer dissenting opinion. According to Justice Stevens’ analysis of the majority

opinion, “The principle on which the holding rests is difficult to perceive” (p. 880). Although Stevens disagreed “with the wisdom of this legislation,” he couldn’t let personal feelings “affect my judgment with respect to its validity” (p. 881). Justice Stevens concluded, “Since I am unable to identify a limitation on that federal power [to regulate commerce] that would not also invalidate federal regulation of state activities that I consider unquestionably permissible, I am persuaded that this statute is valid” (p. 881).

Justice Brennan’s dissent could be described as caustic and hard-hitting. He, and not the majority opinion, rested his position on the judicial precedents illuminating congressional exercise “of its plenary commerce power” (p. 857). In his opinion, Justice Brennan extensively discussed the long line of precedential decisions not addressed by Rehnquist in the majority opinion which illustrated his contention that the Court ignored the rule of *stare decisis* governing three basic constitutional principles, each of which possessed a long legal history, the last principle also possessing two corollary strands, each of which traced its beginnings to eighteenth century Court opinions; offered various characterization’s of the five-member majority opinion; articulated a basic principle underlying delegated powers; criticized the test offered by Rehnquist to determine what was constitutional and what was not under the new ruling; and sounded a constitutional concern regarding the implications of the majority opinion. The three constitutional principles, as well as the two corollary strands of the third constitutional maxim, presented by Justice Brennan along with their illuminating cases were:

- Restraints on congressional exercise of the Commerce Power lie in the political realm, not the judicial sphere.
- Specific constitutional limits on congressional exercise of a delegated power do exist, e.g., impairment of contracts, First Amendment, etc.

- No constitutional constraints resting on state sovereignty act to restrain congressional exercise of a delegated power.
  - Federal government actions are supreme within their sphere of action with state power being correspondingly reduced by constitutional delegations of power to the federal government.
  - The Tenth Amendment does not act to limit the federal exercise of a delegated power.

Justice Brennan began his dissent by noting one feature the majority opinion got right, its concession “that Congress enacted the 1974 amendments pursuant to its exclusive power under Art. I, § 8, cl. 3 of the Constitution ‘[t]o regulate Commerce ... among the several States’” (pp. 856-857). He therefore found the majority opinion “surprising” because, at that particular moment in time (“the bicentennial year of our independence”), the Court chose “to repudiate principles governing judicial interpretation of our Constitution settled since the time of Mr. Chief Justice John Marshall” (p. 857). And so, Justice Brennan launched his examination of various legal lines of thought serving as precedents, which, in his opinion, should have been examined by the five-member majority, but weren’t.

The first line of thought involved the concept that restraints upon congressional exercise of the commerce power “lie in the political process and not in the judicial process” (p. 857). Brennan cited the original precedent for this legal principle offered by Chief Justice Marshall “152 years ago”:

[T]he power over commerce ... is vested in Congress as absolutely as it would be in a single government... *The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are ... the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments*



[emphasis Justice Brennan]. *Gibbons v. Ogden*, 9 Wheat. 1, 197 (1824) (p. 857)

Justice Brennan illustrated the grounding of this legal principle in the Constitutional Convention as reflected by Alexander Hamilton's writing in *The Federalist*.

A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible; free from every other control, but a regard to the public good and to the sense of the people. The *Federalist* No. 31, p. 195 (J. Cooke ed. 1961) (A. Hamilton). (p. 857, n. 1)

As Justice Brennan noted, this principle was most recently reaffirmed by the Court in “*Wickard v. Filburn*, 317 U.S. 111, 120 (1942)” where the Court stated, “At the beginning Chief Justice Marshall ... made emphatic the embracing and penetrating nature of [Congress’ commerce] power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes” (pp. 857-858). Based upon his reading of the majority opinion in light of the precedents governing the principle of political restraint, Justice Brennan characterized the five-member majority’s action as a “patent usurpation of the role reserved for the political process” (p. 858).

The next legal principle addressed by Justice Brennan’s dissent focused on specific constitutional limits upon congressional exercise of a delegated power, in this instance, upon the commerce power. Brennan traced this principle back to its origin in the Marshall Court, observing, “Mr. Chief Justice recognized that limitations ‘prescribed in the constitution,’ *Gibbons v. Ogden*, [9 Wheat. 1 (1824)], at 196, restrain Congress’ exercise of the power” (p. 858). Justice Brennan next listed the Court decisions upholding that principle, first established in 1824: “*Parden v. Terminal R. Co.*, 377 U.S. 184, 191 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964); *United States v. Darby*, 312 U.S. 100, 114 (1941)” (p. 858). Brennan then cited decisions, which held that:

laws within the commerce power may not infringe individual liberties protected by the First Amendment, *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946); the Fifth Amendment, *Leary v. United States*, 395 U.S. 6 (1969); or the Sixth Amendment, *United States v. Jackson*, 390 U.S. 570 (1968). (p. 858)

The third legal principle illustrated by Justice Brennan focused upon the absence of a constitutional restraint, “based upon state sovereignty,” that acted to restrain congressional exercise of a delegated power (p. 858). The origin of this legal principle again resided in the Marshall Court and was “emphasized by Mr. Chief Justice Marshall”:

If any one proposition could command the universal assent of mankind, we might expect it would be this – that the government of the Union, though limited in its powers, is supreme within its sphere of action.... The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, “any thing in the constitution or laws of any State to the contrary notwithstanding.” *M’Culloch v. Maryland*, 4 Wheat. 316, 405-406 (1819). (p. 859)

Justice Brennan proceeded to cite subsequent Court opinions upholding the third legal principle that had a bearing on the case at hand. The Court stated, “‘The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge.’ *In re Rahrer*, 140 U.S. 545, 562 (1891)” (p. 860). Brennan cited *The Minnesota Rate Cases*, 230, U.S. 352, 399 (1913), and observed through a partial quote of the Court’s opinion:

The Constitution reserves to the States “only ... that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal Power” (pp. 859-860).

Justice Brennan summarized and quoted the following Court opinion:

“[It] is not a controversy between equals” when the Federal government “is asserting its sovereign power to regulate commerce .... [T]he interests of the nation are more important than those of any State.” *Sanitary District v. United States*, 266 U.S. 405, 425-426 (1925). (p. 859)

Carrying forth the legal principle first established by the Court in 1819, Justice Brennan cited *United States v. California*, 297 U.S. 175, 184 (1936), which stated: “The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government.... [T]he power of the state is subordinate to the constitutional exercise of the granted federal power” (p. 859). Justice Brennan also cited *North American Co. v. SEC*, 327 U.S. 686, 705 (1946) in which the Court noted that the commerce power “is an affirmative power commensurate with the national needs” (p. 859).

According to Justice Brennan’s summarization of the majority opinion’s attempt to find Tenth Amendment restrictions on a delegated power:

My brethren thus have today manufactured an abstraction without substance, founded neither in the words of the Constitution nor on precedent. An abstraction having such profoundly pernicious consequences is not made less so by characterizing the 1974 amendments as legislation directed against the “States *qua* States.” (p. 860)

After noting, unbelievably, that the Court didn’t base its annulment of a congressional statute on a claim that the 1974 amendments were not indeed regulations of commerce (the only ruling permitted, according to the precedents presented), Justice Brennan continued:

The reliance of my Brethren upon the Tenth Amendment as “an express declaration of [a state sovereignty] limitation,” *ante*, at 842, not only suggests that they overrule governing decisions of this Court that address this question but must astound scholars of the Constitution. (pp. 861-862)

Brennan then cited early nineteenth century precedents, all with the same basic holding:

For not only early decisions, *Gibbons v. Ogden*, 9 Wheat., at 196; *M’Culloch v. Maryland*, *supra*, at 404-407; and *Martin v. Hunter’s Lessee*, 1 Wheat. 304, 324-325 (1816), hold that nothing in the Tenth Amendment constitutes a limitation on congressional exercise of powers delegated by the Constitution to Congress. (p. 862)

Bringing the precedents up to the mid-twentieth century, Justice Brennan next observed that “the Tenth Amendment’s significance was more recently summarized:”

The amendment states but a truism that all is retained which has not been surrendered. *There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the constitution before the amendment* or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.... (Emphasis in original) (p. 862)

The Court’s opinion cited by Justice Brennan continued:

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. *United States v. Darby*, 312 U.S., at 124. (pp. 862-863)

Justice Brennan then noted:

My Brethren purport to find support for their novel state-sovereignty doctrine in the concurring opinion of Mr. Chief Justice Stone in *New York v. United States*, 326 U.S. 572, 586 (1946). That reliance is plainly misplaced.... The Court sustained the federal tax [against a state’s mineral water business]. (p. 863)

Furthermore, according to Justice Brennan, Chief Justice Stone was not addressing “the question of a state-sovereignty restraint upon the exercise of the commerce power, but rather the principle of implied immunity of the States and Federal Government from taxation by the other” (pp. 863-864). Brennan was likewise puzzled by Rehnquist’s “reliance on *Texas v. White*, 7 Wall. 700, 725 (1869)” which recognized the power of the federal government over that of the state governments, particularly the power of “Congress to form a new government in a State if the citizens of that State were being denied a republican form of government” (pp. 867-868, n. 8). According to Justice Brennan, “[N]o precedent justifies today’s result” (p. 869). Brennan declared elsewhere in his dissent, “Today’s repudiation of this unbroken line of precedents that

firmly reject my Brethren's ill-conceived abstraction can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree" (p. 867). Justice Brennan continued:

The only analysis even remotely resembling that adopted today is found in a line of opinions dealing with the Commerce Clause and the Tenth Amendment that ultimately provoked a constitutional crisis for the Court in the 1930's. *E.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. Butler*, 297 U.S. 1 (1936); *Hammer v. Dagenhart*, 247 U.S. 251 (1918). (pp. 867-868)

What Brennan didn't explicitly mention was the fact that Rehnquist's opinion ignored the thrust of these cases. Justice Brennan did, however, cite the cases that first undermined and then finally overruled *Hammer v. Dagenhart*: "see, *e.g.*, *United States v. Darby*, 312 U.S. 100 (1941); *Mulford v. Smith*, 307 U.S. 38 (1939); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937);" and also remarked, "[B]ut my Brethren today are transparently trying to cut back on that recognition of the scope of the commerce power" (p. 868). Continuing to express his incredulity regarding the majority opinion's treatment of the legal principle that the Tenth Amendment not only did not act to diminish the exercise of a delegated power, but also reserved only those powers that were not delegated to the federal government, Justice Brennan declared:

I cannot recall another instance in the Court's history when the reasoning of so many decisions covering so long a span of time has been discarded in such a roughshod manner. That this is done without any justification not already often advanced and consistently rejected, clearly renders today's decision an *ipse dixit* reflecting nothing but displeasure with a congressional judgment. (pp. 871-872)

Sadly, Justice Brennan felt forced to explain a basic principle underlying delegated powers to the five members of the Court's majority, namely that the "Supremacy Clause dictates [federal supremacy over states regarding a delegated power] under 'the federal system of government embodied in the Constitution.' *Ante*, at 852" (p. 875). Incredulity gave way to pain. According

to his last remarks concerning the third legal principle being ignored by the majority opinion, Justice Brennan observed:

My Brethren's disregard for precedents recognizing these long-settled constitutional principles is painfully obvious in their cavalier treatment of *Maryland v. Wirtz*. Without even a passing reference to the doctrine of *stare decisis*, *Wirtz* – regarded as controlling only last Term, *Fry v. United States*, 421 U.S. , at 548, and as good law in *Employees v. Missouri Public Health Dept.*, 411 U.S., at 283 – is by exercise of raw judicial power overruled. (p. 879)

Justice Brennan next focused attention upon the test offered by Rehnquist and his four colleagues to determine the line of demarcation between constitutional and unconstitutional federal actions regarding a resurrected state supremacy. Based upon phraseology used by Rehnquist, Brennan referred to the constitutional-determination test as the “essential-function test” (pp. 879, 880). According to Justice Brennan, the “standard is ... meaningless,” “unworkable,” and “conceptually unworkable” because of the “Brethren’s inability to articulate any meaningful distinctions” (pp. 871, 880). Brennan characterized the majority opinion as “a catastrophic judicial body blow at Congress’ power under the Commerce Clause” (p. 880). Justice Brennan concluded his dissent by sounding a constitutional concern about the structure of government provided by the Constitution which was imperiled by the majority opinion. According to Brennan, “[T]here is an ominous portent of disruption of our constitutional structure implicit in today’s mischievous decision” (p. 880).

*Significance for the tenth amendment.*

Earlier decisions limiting congressional use of the Commerce Power based their determination on whether or not the regulated activity was indeed a part of the Commerce Power, e.g., *Hammer v. Dagenhart*, *Bailey v. Drexel Furniture Company*, *Schechter Poultry Corporation v. United States*, *Carter v. Carter Coal Co.*, etc. Decisions upholding congressional

use of the Commerce Power did so because the regulated activity was judged to be included within the definition of commerce, e.g., *Gibbons v. Ogden*, *Hoke v. United States*, *Brooks v. United States*, etc. The current decision, however, did not claim that the regulated activity was not a part of commerce, a point made by Justice Brennan in opening his dissent. Even more fundamentally troubling, the majority opinion disregarded the literal text of the Tenth Amendment, which declares that only “[t]he powers *not delegated* ... are reserved to the States” (Emphasis added) (Farrand, IV, p. 95). The Commerce Power represents a delegated power according to Article I, § 8, cl. 3 of the Constitution, which reads, “The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” It is most difficult to ascertain how the language of the Tenth Amendment can be construed as a limitation on a power specifically delegated to the federal government, in this case, to Congress. Such, however, appears to be the nature of the fault line running through America’s political history, the division between federal and state sovereignty, which is embedded via the concepts of federalism and separation of powers. The nature of the fault line in this instance seems to have precluded sound legal reasoning being used that was based upon established constitutional principles and upon *stare decisis*, one of the few instances of such a fault having been discovered thus far in the examination of cases in this paper.

More troubling to contemporaries who had to function in accordance with the Court’s ruling, the test drawing the line between permissible and impermissible behavior on the part of the federal government towards the states was not clearly defined. The majority opinion used the following descriptions of impermissible congressional infringement upon state government operations without providing any definition: “functions essential to separate and independent existence” (p. 845), “traditional aspects of state sovereignty” (p. 849), “essential governmental

decisions” (p. 850), “integral governmental functions” (pp. 851, 855), “integral operations in areas of traditional government functions” (p. 852), “essentials of state sovereignty” (p. 855), and “traditional operations of state and local governments” (p. 855). Unanswered were questions about the meaning of traditional, essential, and integral as they applied to the operation of state and municipal governments. Rehnquist did provide examples of state and municipal services that would be off-limits to the federal government, which included “fire prevention, police protection, sanitation, public health, and parks and recreation,” with “schools and hospitals” being added later (pp. 851, 855).

The decision in *National League of Cities v. Usery* (1976) would only be controlling for the next nine years before it was overturned by the Court’s decision in *Garcia v. San Antonio Transit Authority* (1985). During the intervening period, Justice Sandra Day O’Connor would replace Justice Potter Stewart, but would vote in *Garcia* as Justice Stewart had voted in *National League of Cities*. The swing vote in *Garcia* would be that of Justice Harry Blackmun, who would vote against the precedent of *National League of Cities* that he had supported previously. In a separate concurring opinion in *National League of Cities*, Justice Blackmun indicated that he was “not untroubled by certain possible implications of the Court’s opinion” (p. 856). Instead of becoming less troubled over the course of the intervening years, Blackmun became more troubled, especially by “the Court’s inability to arrive at meaningful and clear distinctions under the *National League of Cities* precedent” (Hall, p. 325). Blackmun, in fact, would write the majority opinion in *Garcia v. San Antonio Transit Authority*, 469 U.S. 528, 530 (1985) that would overturn the *National League of Cities* decision.

***FERC v. Mississippi*, 456 U.S. 742 (1982).**

*Case summary.*



FERC is the acronym for the Federal Energy Regulatory Commission that was supervised by the Secretary of Energy. In 1978 Congress enacted the Public Utility Regulatory Policies Act (PURPA) “as part of a legislative package designed to combat the nationwide energy crisis” (p. 744). President Carter signed it into law on November 9, 1978 (p. 745). The law was based on the following findings by Congress: “generation of electricity consumed more than 25% of all energy resources used in the United States;” “one-third of the electricity in this country was generated through use of oil and natural gas;” “because of their reliance on oil and gas, electricity utilities were plagued with increasing costs and decreasing efficiency in the use of their generating capacities;” and “each of these factors had an adverse effect on rates to consumers and on the economy as a whole” (pp. 745, 746). Based on its investigative findings, Congress

determined that conservation by electricity utilities of oil and natural gas was essential to the success of any effort to lessen the country’s dependence on foreign oil, to avoid a repetition of the shortage of the shortage of natural gas that had been experienced in 1977, and to control consumer costs. (p. 746)

The various titles within PURPA shared “three goals: (1) to encourage ‘conservation of energy supplied by ... utilities’; (2) to encourage ‘the optimization of the efficiency of use of facilities and resources’ by utilities; and (3) to encourage ‘equitable rates to ... consumers’” (p. 746). To aid in the achievement of the act’s goals, PURPA directed “state utility regulatory commissions and nonregulated utilities to ‘consider’ the adoption and implementation of specific ‘rate design’ and regulatory standards” (p. 746). PURPA also prescribed that “certain procedures ... be followed by the state regulatory authority and the nonregulated utility when considering the proposed standards,” e.g., “public hearing after notice, and a written statement of reasons ... be made available to the public if the standards [were] not adopted” (p. 748). The act

also stipulated that each state authority and nonregulated utility was to submit annual reports to the Secretary of Energy “respecting its consideration of the standards established” (p. 749).

PURPA contained a provision making it clear that neither states nor unregulated utilities were required “to adopt or implement the specified rate design or regulatory standards” (pp. 749-750).

A particular section of PURPA focused on encouraging “the development of cogeneration and small power production facilities” (p. 750). In its investigation, Congress had discovered two problems that interfered with

the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development. (pp. 750-751)

To help overcome the identified obstacles, the act directed FERC to develop rules it deemed necessary “to encourage cogeneration and small power production” that could include “rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities” (p. 751). PURPA also directed FERC “to prescribe rules exempting the favored cogeneration and small power facilities from certain state and federal laws governing electricity utilities” (p. 751).

The State of Mississippi and the Mississippi Public Service Commission filed suit against FERC and the Secretary of Energy in United States District Court for the Southern District of Mississippi in April, 1979. They sought a declaratory judgment that PURPA was unconstitutional because the act “was beyond the scope of congressional power under the Commerce Clause and that it constituted an invasion of state sovereignty in violation of the Tenth Amendment” (p. 752). The district court delivered “an unreported opinion,” which held that PURPA’s requirements went beyond the commerce powers granted to Congress “under the

Commerce Clause” (p. 753). The district court also relied on the Court’s ruling in *National League of Cities v. Usery* to conclude that “PURPA trench[ed] on state sovereignty” (p. 753).

The district court ruled that PURPA was unconstitutional because the act’s provisions constituted “a direct intrusion of integral and traditional functions of the State of Mississippi” (p. 753). Not explained were the district court’s reliance on the Guarantee Clause and the Supremacy Clause in helping it reach its conclusions (p. 753). Appealing directly to the Supreme Court, FERC and the Secretary of Energy were granted the right to argue their case before the Court, which had “noted probable jurisdiction” in granting the appeal (p. 753).

Justice Blackmun delivered the opinion for the 5-4 majority, which overturned the lower court’s ruling. Justices Brennan, White, Marshall, and Stevens, joining him, provided the Court’s majority. Justices Powell and O’Connor each wrote opinions, “concurring in part and dissenting in part” (p. 743). Justice Rehnquist and Chief Justice Burger joined in O’Connor’s dissent.

Justice Blackmun opened the Court’s opinion by stating, “We readily conclude that the District Court’s analysis and the appellees’ arguments are without merit so far as they concern the Commerce Clause” (p. 753). Immediately Justice Blackmun established that, unlike *National League of Cities*, this decision would be based upon established legal principles governed by *stare decisis*. Directly confronting the issue ignored previously in *National League of Cities* (see p. 415 of this paper; see also 426 U.S. 833, 861), Justice Blackmun cited a recent opinion that carried forward a principle first established by the Court in *Gibbons v. Ogden* (1824):

A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable

connection between the regulatory means selected and the asserted ends.  
 [*Hodel v. Indiana*, 452 U.S. 314 (1981)], at 323-324. (p. 754)

The State of Mississippi, citing *Carter v. Carter Coal Co.* (1936), had argued, “Congress is powerless to regulate anything which is not commerce, as it is powerless to do anything about commerce which is not regulation” (p. 754). Mississippi also put forth the distinction sanctioned by *Carter*, but overruled by *Darby*, that the “‘governance of commerce’ by the State” was a different matter from “commerce itself,” and that governance of commerce lay “outside the plenary power of Congress” (p. 755). According to Justice Blackmun, “The difficulty with these arguments is that they disregard entirely the specific congressional finding ... that the regulated activities have an immediate effect on interstate commerce” (p. 755). Blackmun described the findings, which he summarized below, as “clear and specific”:

Congress there determined that “the protection of the public health, safety, and welfare, the preservation of national security, and the proper exercise of congressional authority under the Constitution to regulate interstate commerce require,” among other things, a program for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electricity utilities, and equitable retail rates for electricity consumers...” (p. 755)

The basic question to be addressed was “whether the congressional findings have a rational basis” (pp. 755-756). Answering the question, Justice Blackmun observed, “The legislative history provides a simple answer: there is ample support for Congress’ conclusions” (p. 756). Examples providing support included investigations by both House and Senate committees that reached the same conclusion, “that the energy problem was nationwide in scope” and “demonstrated the need to establish federal standards regarding retail sales of electricity, as well as federal attempts to encourage conservation and more efficient use of scarce energy resources” (pp. 756-757). The Court concluded that Congress did have a rational basis and that there was a

connection between congressional action and interstate commerce. As the Court stated in its opinion:

It is not for us to say whether the means chosen by Congress represent the wisest choice. It is sufficient that Congress was not irrational in concluding that limited federal regulation of retail sales of electricity and natural gas, and of relationships between cogenerators and electric utilities, was essential to protect interstate commerce. That is enough to place the challenged portions of PURPA within Congress' power under the Commerce Clause. (p. 758)

The State of Mississippi's reliance on *Carter v. Carter Coal Co.* illustrated the tangled and somewhat complicated web woven by court opinions acting to serve as judicial precedents for legal principles, some of which were diametrically opposed. The *Carter* decision, which invalidated the New Deal's Bituminous Coal Conservation Act in 1936 that established minimum wage requirements and collective bargaining, was described as representing "the twilight of the Tenth Amendment and states' rights" (Hall, 1992, p. 129). Two items, aside from the nature of the conflict between the Tenth Amendment and the Commerce Clause, made *Carter* especially appealing to Mississippi in the aftermath of *National League of Cities*. First, *Carter* distinguished between items of production and commerce itself (Hall, 1992, p. 129). Second, the majority 5-4 opinion "argued that the benefits of preserving the boundaries between states and the federal government were central to the integrity of the constitutional system" (Hall, 1992, p. 128). Justice Sutherland, the author of the Court's opinion in *Carter*, wrote using imagery suggestive of the seduction of a virtuous state sovereignty (feminine liberty) by a guileful federal government (rapacious male power) bent on serving its own ends by ignoring constitutional (ethical and moral) restraints:

Every journey to a forbidden end begins with the first step; and the danger of such a step by the government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or ... so relieved of the responsibilities ... as to reduce them to

little more than geographical subdivisions of the national domain. 298 U.S. 238, 266. (Cited in Hall, 1992, pp. 128-129)

This line of thought resonated with Rehnquist's opinion in *National League of Cities* (see 426 U.S. 833, 847-852; also, pp. 406-409 of this paper). The problem with *Carter* began when portions of its holdings (re: collective bargaining) were overruled by *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). There the Court upheld the New Deal's National Labor Relations Act under the Commerce Power by asserting, "Congress can reach and regulate not only interstate commerce itself but also any activity [collective bargaining] affecting commerce, whether directly or indirectly" (Hall, 1992, p. 572). The remaining portions of *Carter* as well as *Hammer v. Dagenhart* were overruled by a unanimous Court in *Darby*, which upheld the validity of the Fair Labor Standards Act (312 U.S. 100).<sup>56</sup> *Darby*'s holding was extended by the Court's 1968 decision in *Maryland v. Wirtz* (392 U.S. 183). However, *National League of Cities* overruled *Wirtz*, thus calling into question both *Darby* and *NLRB*, which in turn possibly resurrected *Carter v. Carter Coal Co.* Thus *FERC* provides an interesting illustration of precedents and the resulting implications when precedents are either ignored (as happened in *National League of Cities*) or are overruled (as happened with *Hammer* in *Darby* or with *Plessy* in *Brown*). The difference in impact can be seen by comparing the Court majorities in *Darby* (unanimous), *Brown* (unanimous), and *National League of Cities* (narrowly split 5-4). *Brown* continues to serve as a precedent fifty-two years later, *Darby* served as a precedent for thirty-five years before being overruled temporarily and subsequently reinstated, and *National League of Cities* served as a precedent for less than ten years before being overturned by *Garcia*.

Justice Blackmun characterized the Tenth Amendment issue in *FERC* as being "somewhat novel" because in one respect it was similar to *National League of Cities*, but in another respect it was different (p. 758). Both cases featured "principles of state sovereignty" (p.

758). However, whereas *National League of Cities* dealt with “the extent to which state sovereignty shields the States from generally applicable federal regulations,” *FERC* dealt with “the Federal Government attempts to use state regulatory machinery to advance federal goals” (p. 759). According to Blackmun, PURPA did this through three federal requirements: “(1) § 210 has the States enforce standards promulgated by FERC; (2) Titles I and III direct the States to consider specified ratemaking standards; and (3) those Titles impose certain procedures on state commissions” (p. 759). Justice Blackmun proceeded to examine each.

Regarding the § 210 requirements, Blackmun observed:

[I]t does nothing more than pre-empt conflicting state enactments in the traditional way. Clearly, Congress can pre-empt the States completely in the regulation of retail sales by electricity and gas utilities and in the regulation of transactions between such utilities and cogenerators. (p. 759)

Justice Blackmun also cited the ruling in *Testa v. Katt*, 330 U.S. 386 (1947) which directed state courts “to heed the constitutional command that ‘the policy of the federal Act is the prevailing policy in every state ... and should be respected accordingly in the courts of the State’” (p. 760). Blackmun also cited the principle established by *Martin v. Hunter’s Lessee*, 1 Wheat. 304, 340-341 (1816) which established “the pre-eminent position held by federal law throughout the Nation” (p. 761).

Justice Blackmun then moved to consideration of PURPA’s requirements directing states to consider federal standards. After reviewing Titles I and III of the act, Blackmun concluded, “There is nothing in PURPA ‘directly compelling’ the States to enact a legislative program” (p. 765). The Court concluded:

[B]ecause the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States’ “separate and independent existence,” ... and do not impair the ability of the States “to function

effectively in a federal system.” ...To the contrary, they offer the States a vehicle for remaining active in an area of overriding concern. (pp. 765-766)

And, perhaps to demonstrate its continued validity as a judicial precedent, Justice Blackmun discussed another Court opinion that cited *Darby*:

The Tenth Amendment, the Court declared [in *Oklahoma v. CSC*, 330 U.S. 127 (1947)], has been consistently construed “as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end,” ... quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)... (p. 766)

Justice Blackmun compared the issue in *FERC* to that in *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 289 (1981):

[T]he most that can be said is that the ... Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs. (p. 767)

*Hodel v. Virginia Surface Mining & Reclamation Association* made an apt comparison in another respect as well because *Hodel* established a constitutional test to help determine legitimacy regarding the Court’s opinion in *National League of Cities*: “Did congressional legislation regulate states as states, indisputably impinge on an attribute of state sovereignty, and directly impact integral operations in areas of traditional governmental functions” (Hall, 1992, p. 834)? The fourth aspect of the test asked, “Is ‘the nature of the federal interest’ substantial enough to justify state submission” (Hall, 1992, p. 325). Although the criteria for each question were still vague, Justice Blackmun ascertained that PURPA passed the test: “Whatever the constitutional problems associated with more intrusive federal programs, the ‘mandatory consideration’ provisions of Titles I and III must be validated under the principle of *Hodel v. Virginia Surface Mining & Recl. Assn.*” (p. 770).



With regards to the procedural requirements of Titles I and III of PURPA, the Court noted, “[W]e uphold the procedural requirements under the same analysis [the *Hodel* test] employed above in connection with the ‘consideration’ provisions” (p. 771). Justice Blackmun continued by summarizing the Court’s holdings:

If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field – and we hold today that it can – there is nothing unconstitutional about Congress’ requiring certain procedural minima as that body goes about undertaking its tasks. The procedural requirements obviously do not compel the exercise of the State’s sovereign powers... (p. 771)

The majority opinion announced its final verdict, “The judgment of the District Court is reversed. *It is so ordered*” (Emphasis in the original) (p. 771).

*Significance for the tenth amendment.*

*FERC*, in reversing a lower court decision based on *National League of Cities*, served as a possible harbinger of what lay ahead. In *FERC* Justice Blackmun joined the four justices who had dissented in *National League of Cities*. Of significance, this case got the Court back on track procedurally by its consideration of established legal principles and through its examination of judicial precedents governing constitutional issues. The dissenters in *FERC*, however, disagreed with what they regarded as the majority opinion’s “undervaluing *National League of Cities*” while expressing confidence that “today’s decision is not intended to overrule *National League of Cities*” (p. 769, n. 32; p. 782, n. 9).<sup>57</sup> *National League of Cities* would be overruled four years later by *Garcia*, and the same jurist, Justice Blackmun, would write the opinion in that case as well as the current one.

***Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).***

*Case summary.*

The facts and history of *Garcia* form a somewhat complicated web regarding: the history of mass transit in San Antonio and its movement from a private company to a private company that was publicly regulated (1913) to a public transit system (1959) to a county-wide metropolitan transit authority (1978); the history of the Fair Labor Standards Act in relation to transit authorities; the legal filings in the dispute; and the legal history subsequent to the legal filings (p. 531).

The essentials of mass transit history in San Antonio were briefly summarized in the preceding paragraph. The Fair Labor Standards Act, as originally enacted in 1938, did not include “mass-transit employees” or “employees of state and local governments” (p. 533). Through an amendment to the act in 1961, Congress extended minimum-wage requirements to employees of private mass-transit companies whose gross revenues exceeded \$1 million. In 1966 Congress again amended the FLSA by “withdrawing the minimum-wage and overtime exemptions from public hospitals, schools, and mass-transit carriers whose rates and services were subject to state regulation” (p. 533). The 1966 amendments were challenged, but were upheld by the Court in *Maryland v. Wirtz* in 1968. The San Antonio Transit System complied with the Fair Labor Standards Act’s requirements until the Court overruled *Maryland v. Wirtz* with its 1976 decision in *National League of Cities*. In 1979 a sub-agency of the Department of Transportation “issued an opinion that SAMTA’s operations ‘are not constitutionally immune from the application of the Fair Labor Standards Act’ under *National League of Cities*” (p. 534). One month after the ensuing legal challenge was filed, the Department of Labor officially amended the FLSA “interpretive regulations” by withdrawing immunity under the *National League of Cities* ruling from all “publicly owned local mass-transit systems” (p. 534).

Two months after the sub-agency of the Department of Transportation made its initial recommendation, the San Antonio Metropolitan Transit Authority filed suit in the U.S. District Court for the Western District of Texas. SAMTA “sought a declaratory judgment that, contrary to the Wage and Hour Administration’s determination, *National League of Cities* precluded the application of the FLSA’s overtime requirements to SAMTA’s operations” (p. 534). The Secretary of Transportation filed a counterclaim in the District Court for the Western District of Texas seeking “enforcement of the overtime and recordkeeping requirements of the FLSA” (p. 534). At the same time, Garcia and other SAMTA employees filed suit against SAMTA for overtime pay under the Fair Labor Standards Act. The District Court stayed action in Garcia’s suit “pending the outcome” of the two other legal actions, but “allowed Garcia to intervene in the present litigation as a defendant in support of the Secretary” (p. 534).

The legal history of court rulings commenced two years later (November 17, 1981), when the District Court for the Western District of Texas “granted SAMTA’s motion for summary judgment” while denying the Secretary of Transportation’s (and Garcia’s, as co-defendant) “cross-motion for partial summary judgment” (p. 535). Without explaining its ruling, the District Court held “that ‘local public mass transit systems (including [SAMTA]) constitute integral operations in areas of traditional governmental functions’ under *National League of Cities*” (p. 535). Under federal law, Garcia and the Secretary of Transportation appealed the District Court’s decision to the U.S. Supreme Court. While the appeals were pending, the Court ruled in *Transportation Union v. Long Island Rail Company*, 455 U.S. 678 (1982), “that commuter rail service provided by the state-owned Long Island Rail Road did not constitute a ‘traditional governmental function’ and hence did not enjoy constitutional immunity, under *National League of Cities*...” (p. 535). In accordance with its recent ruling, the Court “vacated

the District Court's judgment in the [San Antonio] cases and remanded them for further consideration in the light of *Long Island*" (p. 535). Once back in Texas, the District Court stuck with its former view and ruled once again in favor of SAMTA. Citing the Court's ruling in *National League of Cities* as controlling, the District Court examined mass transit in light of the "list of functions identified as constitutionally immune in *National League of Cities* and concluded that it did not differ from those functions in any material respect. In explaining its conclusion, the District Court observed:

If transit is to be distinguished from the exempt [*National League of Cities*] functions it will have to be by identifying a traditional state function in the same way pornography is sometimes identified: someone knows it when they see it, but they can't describe it. 557 F. Supp., at 453. (p. 536)

As before, Garcia and the Secretary of Transportation appealed directly to the Supreme Court, which "noted probable jurisdiction" (p. 536). After initial arguments were presented by both sides, the Court set a date for reargument with attorneys from both sides "requested to brief and argue the following additional question: Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities* ... should be reconsidered" (p. 536).

Justice Blackmun delivered the Court's opinion for the 5-4 majority, which overruled *National League of Cities* and reversed the District Court decision. Justices Brennan, Marshall, Stevens, and White joined Blackmun to constitute the Court's majority. The four minority justices (Chief Justice Burger and Justices Powell, Rehnquist and O'Connor) wrote three dissenting opinions in a veritable mix-match of which justices joined or didn't join each of the dissents.

Justice Blackmun opened the Court's opinion by announcing the holding, after which he spent the remainder of the opinion explaining the legal reasoning and rationale behind the Court's ruling. As Justice Blackmun announced:

Our examination of this “function” standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of “traditional governmental function” is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. (p. 531)

After reviewing the facts and procedural history of the case, Justice Blackmun addressed the difficulties posed by the *Hodel* tests based upon the Court’s ruling in *National League of Cities*. Upon examining multiple federal cases, he concluded that courts found the following functions to be protected from federal intrusion: “regulating ambulance services, ... licensing automobile drivers, ... operating a municipal airport, ... performing solid waste disposal, ... and operating a highway authority” (p. 538). According to Blackmun’s analysis of opinions, the following functions were “*not* entitled to immunity” [J. Blackmun’s emphasis] from the Fair Labor Standards Act: “issuance of industrial development bonds, ... regulation of intrastate natural gas sales, ... regulation of traffic on public roads, ... regulation of air transportation, .... operation of a telephone system, ... leasing and sale of natural gas, ... operation of a mental health facility, ... and provision of in-house domestic services for the aged and handicapped” (Emphasis in original) (pp. 538-539). Justice Blackmun observed:

We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side. The constitutional distinction between licensing drivers and regulating traffic, for example, ... is elusive at best. (p. 539)

Having analyzed the performance of the lower federal courts, Justice Blackmun admitted the Court’s record was not much better.

Thus far, this court itself has made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities*. In that case the Court set forth examples of protected and unprotected functions, ... but provided no explanation of how those examples were identified. (p. 539)

Justice Blackmun noted that the Court “did not offer an explanation of what makes one state function a ‘basic prerogative’ and another function not basic”(p. 540). According to Blackmun, the Court’s own opinions reflected “an inability to specify precisely what aspects of a governmental function made it necessary to the ‘unimpaired existence’ of the States” (p. 541).

From his analysis, Justice Blackmun discovered “a more fundamental problem at work ... that explain[ed] why the Court was never able to provide a basis for ... distinctions with respect to federal regulatory authority under *National League of Cities*” (p. 545). The fundamental problem at work was that no distinction “that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society” (p. 546). Justice Blackmun cited Justice Black’s concurring opinion in *Helvering v. Gerhardt*, 304 U.S., at 427:

There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people – acting not through the courts but through their elected legislative representatives – have the power to determine as conditions demand, what services and functions the public welfare requires. (p. 546)

According to Justice Blackmun, the intrinsic nature of federalism required that it remain open-ended and flexible as opposed to being bound by rigid definitions.

The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else – including the judiciary – deems state involvement to be. Any rule of state immunity that looks to the “traditional,” “integral,” or “necessary” nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. (p. 546)

Citing the Court's judgment in 1821, which observed, "The science of government ... is the science of experiment," and Justice Brandeis' classic dissenting observation in 1932, which characterized the states as "laboratories for social and economic experiment," Justice Blackmun announced the Court's conclusion:

We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconstant results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles... (pp. 546-547)

The dissenting opinions were long on the use of rhetorical devices and propaganda techniques, but were short on legal analyses relating to the central question of the Tenth Amendment's lack of ability to limit the exercise of a delegated power. The Court majority got back on track with precedents, but ironically, Justice Powell thought that any departures from *stare decisis* demanded special attention (p. 559). The irony derived from three facts: first, the Court was getting back to a more established rule of law in *Garcia*; second, the Court's departure from *stare decisis* in *National League of Cities* with no "special justification" had provoked no such outcry from Justice Powell; and third, a judicious use of precedents would have focused on the question of whether or not the regulation in question established the necessary nexus with commerce. Justice Powell also made inaccurate statements. He characterized *Garcia* as a radical departure "from long-settled constitutional values" when in actuality just the opposite occurred (p. 561). Powell also falsely claimed that *Garcia* "ignore[d] the role of judicial review in our system of government," a claim that is hard to fathom given the Court's use of judicial review to correct the judicial mistakes of *National League of Cities*. Powell combined a false claim with a glittering generality in mischaracterizing *National League of Cities* as being

“faithful to history in its understanding of federalism” when in fact the opposite was true (p. 573). In *Garcia*, the Court overruled *National League of Cities* precisely because *National League of Cities* had not been “faithful to the role of federalism in a democratic society” (p. 546). Finally, Justice Powell trotted out the long discredited states’ rights claim that the Constitution represented a pact by the states instead of flowing from the people when he referred to “the States’ ratification of the Constitution” as illustrating the states’ “major role” in federalism (p. 568).<sup>58</sup>

Justice O’Connor began her dissent with the following hyperbole, “The Court today surveys the battle scene of federalism and sounds a retreat” (p. 580). Similarly to Justice Powell, Justice O’Connor did not address the central legal question of how exactly the Tenth Amendment could be construed as a limitation upon a power delegated by the Constitution to the federal government. She cited the Tenth Amendment without addressing the issue of its use as a limitation upon a delegated power (p. 582). O’Connor ignored precedent which would have dictated an effort to separate the regulated behavior from commerce so as to then legitimately bring the Tenth Amendment into play. Some irony attached to O’Connor’s desire to see a strict construction placed upon the commerce power, while at the same time she desired to ignore the text of the Tenth Amendment which specified that only those powers not delegated were reserved to the states or to the people (p. 583). Since the text of the Tenth Amendment didn’t serve her needs, Justice O’Connor searched for a mystical explanation. “The *spirit* [emphasis O’Connor’s] of the Tenth Amendment, or course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme” (p. 585). She continued, “It is not enough that the ‘end be legitimate’; the means to that end chosen by Congress must not contravene the spirit of the Constitution” (p. 585). Exactly what criteria were



to be employed in divining the “spirit of the Constitution” remained, however, elusive, as Justice O’Connor didn’t spell them out.

Justice Rehnquist offered a one-paragraph dissent in which he again chose to ignore the central legal question, “How can the language of the Tenth Amendment be construed so that the Tenth serves as a limitation upon a specifically delegated power?” Disappointed that his opinion in *National League of Cities* had been overruled, Rehnquist elected to not “spell out further the fine points of a principle that will ... in time again command the support of a majority of this Court” (p. 580). The dissenting opinions provide illumination as to the use of rhetorical devices and propaganda techniques employed to disguise the fact of a poor constitutional foundation erected through weak, in some cases, irrelevant legal arguments.

*Significance for the tenth amendment.*

In fashion similar to *FERC*, *Garcia* got the Court back on track procedurally through its consideration of established legal principles and by its examination of judicial precedents governing constitutional issues. *Garcia* also moved the Court to a sounder footing regarding the Tenth Amendment’s inability to serve as a limitation upon a delegated power. It would seem to portend that future constitutional challenges to legislation would have to focus upon separating the regulated behavior from a delegated power in order to legitimately bring the Tenth Amendment into play. What remained unclear was the extent to which the Court’s characterization of the Constitution as providing structural restraints upon congressional power (through the political process as opposed to substantive restraints through the Tenth Amendment) referred only to those intersections of the Tenth Amendment with delegated powers, or whether instead it would be expanded to include those clashes between the states and Congress over powers not delegated by the Constitution to the federal government.

The majority opinion in *National League of Cities*, combined with the dissenting opinions in both *FERC* and *Garcia*, provoked the following analysis by a constitutional historian: “Some classic issues of state sovereignty have also centered on efforts by the Court’s new conservative justices to restore the force of the Tenth Amendment as a substantive limitation on Congress’s commerce powers” (Hall, 1992, p. 286).

***South Carolina v. Baker, 485 U.S. 505 (1988).***

*Case summary.*

The case centers on the case law surrounding taxation, particularly upon the intersection of the Tenth Amendment, the doctrine of intergovernmental tax immunity, and tax legislation. The particular tax legislation precipitating this controversy involved § 310 of the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982, which emerged after House and Senate hearings centering upon revenues lost through evasion of the nation’s tax laws. Specifically the Act removed “the federal income tax exemption for interest earned on publicly offered long-term” bearer bonds (p. 505). TEFRA, however, left intact the federal income tax exemption on registered bonds.<sup>59</sup>

Congress’ purpose in enacting TEFRA was “to reduce the federal deficit by promoting compliance with the tax laws” (p. 508). According to testimony received by the Subcommittee on Oversight of the Internal Revenue Service of the Senate Committee on Finance, unreported income on which no taxes were paid had increased dramatically during the period 1973 – 1981 by approximately 300%, from a range of \$31.1 – \$32.2 billion in 1973 to a range of \$93.3 - \$97 billion in 1981 (pp. 508-509). Attention was soon focused on bearer bonds “because they left no paper trail and thus facilitated tax evasion” (p. 509). Testimony before the House Ways and Means Committee by an Assistant Secretary of the Treasury for Tax Policy indicated that “bearer

bonds were being used to avoid estate and gift taxes and as a medium of exchange in the illegal sector” (p. 509). Because of their use in financing illegal activities as well as in avoiding taxes, § 310 of TEFRA addressed unregistered, or bearer, bonds issued by the federal government, state governments, and private corporations (p. 510). Besides prohibiting the federal government from issuing nonregistered bonds, § 310 imposed “a series of tax penalties” on nonregistered bonds, which included “denying the federal income tax exemption for interest earned on state bonds to owners of long-term publicly offered state bonds that are not issued in registered form” (p. 510).

The State of South Carolina “invoked the original jurisdiction of [the] Court” by “contending that § 310(b)(1) [was] constitutionally invalid under the Tenth Amendment and the doctrine of intergovernmental tax immunity” (p. 510). The Court granted South Carolina permission to file a complaint against Treasury Secretary Regan and appointed a Special Master with authority to conduct hearings, take evidence, and recommend a judgment. The complaint was filed in 1984. Subsequently the National Governors’ Association requested and was granted permission to intervene in the case against the Secretary of the Treasury. The Special Master completed his work and filed his report with the Supreme Court in early 1987, which “concluded that § 310(b)(1) was constitutional and recommended entering judgment for the defendant” (pp. 510-511). The National Governors’ Association and the State of South Carolina “filed exceptions to various factual findings of the Special Master and to the Master’s legal conclusions concerning their constitutional challenges” (p. 511). On October 5, 1987, the Court set the date for oral arguments regarding the “Exceptions to the Report of the Special Master” (484 U.S. 808). *South Carolina v. Baker, Secretary of the Treasury*, which had begun as *South Carolina v.*

*Regan*, 465 U.S. 367 (1984), was argued on December 7, 1987, and decided on April 20, 1988 (p. 505).

Justice Brennan delivered the decision for the 5-3 majority. Justice Kennedy did not participate in the case. Justices White, Marshall, Blackmun, and Stevens joined Justice Brennan. Justice Scalia filed an opinion concurring in the judgment and concurring in part with the opinion. Chief Justice Rehnquist filed an opinion that concurred in the judgment. Justice O'Connor filed a dissenting opinion.

Separate attorneys for the National Governors' Association and South Carolina each presented oral arguments to the Court. The Solicitor General argued the case for the federal government. Plaintiff attorneys contended that in effectively banning bearer bonds, the States have no other option than to offer registered bonds, which constitutes a violation of the States' sovereignty guaranteed under the Tenth Amendment (p. 511). The Solicitor General argued that "a blanket prohibition by Congress on the issuance of bearer bonds [could] apply to States without violating the Tenth Amendment" (p. 511). Both plaintiff and defendant attorneys, as well as the Court, interpreted the *Garcia* ruling to mean that "Tenth Amendment limits on Congress' authority to regulate state activities ... are structural, not substantive – i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activities" (p. 512). Attorneys for South Carolina argued that the political process failed "because Congress had no concrete evidence quantifying the tax evasion attributable to unregistered state bonds and relied instead on anecdotal evidence" (p. 512). They further contended that the political process failed because "Congress chose an ineffective remedy by requiring registration because most bond sales are

handled by brokers who must file information reports regardless of the form of the bond” (p. 512).

In response to the argument that “§ 310(b)(1) was ‘imposed by the vote of an uninformed Congress relying upon incomplete information,” the Court noted that South Carolina did not argue it was “deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless” (p. 513). Since the “national political *process* [emphasis Brennan’s] did not operate in a defective manner, the Tenth Amendment [was] not implicated” (p. 513). Furthermore, in response to plaintiff contentions that § 310(b)(1) was not an effective remedy for the stated problem, the Court stated that “nothing in *Garcia* or the Tenth Amendment authorize[d] [the] courts to second-guess the substantive basis for congressional legislation” (p. 513).

Attorneys for the National Governors’ Association had argued that § 310 was unconstitutional “because it commandeered [the] state legislative and administrative process by coercing States into enacting legislation authorizing bond registration and into administering the registration scheme” (p. 513). In support of their argument, they cited *FERC* as having “left open the possibility that the Tenth Amendment might set some limits on Congress’ power to compel States to regulate on behalf of federal interests” (p. 513). Noting that “the claim discussed in *FERC*” was inapplicable to § 310,” the Court further noted that § 310, while regulating state activities, did not “seek to control or influence the manner in which States regulate private parties” (p. 514). The simple fact that state legislatures were required to amend statutes regarding the issuance of bonds was “an inevitable consequence of regulating a state activity” (p. 514). The Court continued:

Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative

action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect. After *Garcia*, for example, several States and municipalities had to take administrative and legislative action to alter the employment practices or raise the funds necessary to comply with the wage and overtime provisions of the Federal Labor Standards Act. (pp. 514-515)

After discussing precedents and exploring the legal ramifications of the NGA's argument, the Court ruled, "We find the theory foreclosed by precedent, and uphold the constitutionality of § 310 under the Tenth Amendment" (p. 515).

The Court next examined plaintiff claims under the doctrine of intergovernmental tax immunity. The Court agreed with South Carolina's claim that the Court's holding in *Pollock v. Farmers' Loan & Trust Co.* (1895), which ruled "that any interest earned on a state bond was immune from federal taxation" (p. 516). The legal rationale behind the ruling was that taxing the interest from state bonds constituted a direct tax on the State, which was unconstitutional. However, both the Solicitor General and the Special Master recommended that § 310 be upheld without overturning *Pollock* because § 310 didn't entirely abolish the tax exemption for state bond interest because it left the exemption for interest from registered bonds issued by the State. The Court declined to follow the suggestion of the Solicitor General and the Special Master, noting, "If this constitutional rule [*Pollock*] still applies, Congress cannot threaten to tax the interest on state bonds that do not conform to congressional dictates" (p. 516). The Court further noted, "Congress cannot employ unconstitutional means to reach a constitutional end" (p. 516).

And so, the Court began to examine the rationale behind *Pollock* and then proceeded to examine the case law of taxation by re-stating the underlying principle. According to the Court:

This general rule [of tax immunity] was based on the rationale that any tax on income a party received under a contract with the government was a tax on the contract and thus a tax "on" the government because it burdened the government's power to enter into the contract.... Thus, although a tax was collected from an independent private party, the tax was considered to be

“on” the government because the tax burden might be passed on to it through the contract. This reasoning was used to define the basic scope of both federal and state tax immunities with respect to all types of government contracts. (p. 518)

Thus, federal bond interest, salaries of federal employees, income derived from federal leases, and vendor sales to the federal government were all exempt from state taxation (pp. 515-517).

Likewise, similar contracts with the state governments were exempt from federal taxation (p.

517). However, according to the Court:

The rationale underlying *Pollock* and the general immunity for government contract income has been thoroughly repudiated by modern intergovernmental immunity case law. In *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466 (1939), the Court announced: “The theory ... that a tax on income is legally or economically a tax on its source, is no longer tenable.” *Id.*, at 480. (p. 520)

The Court then cited the case law by which “the government contract immunities recognized under [*Pollock*] were, one by one, eliminated” (pp. 521-522). Summarizing the current doctrine of intergovernmental tax immunity, the Court reported, “[T]he States can never tax the United States directly but can tax any private parties with whom it does business.... The rule with respect to state tax immunity is essentially the same” (p. 523). The Court officially “confirm[ed] that subsequent case law has overruled the holding in *Pollock* that state bond interest is immune from a nondiscriminatory federal tax” (p. 524). Next, the Court announced its official finding:

TEFRA § 310 thus clearly imposes no direct tax on the States. The tax is imposed on and collected from bondholders, not States, and any increased administrative costs incurred by States in implementing the registration system are not “taxes” within the meaning of the tax immunity doctrine. (p. 526)

The Court’s second finding followed:

Nor does § 310 discriminate against States. The provisions of § 310 seek to assure that *all* [emphasis Brennan’s] publicly offered long-term bonds are issued in registered form, whether issued by state or local governments, the Federal Government, or private corporations. (pp. 526-527)

The Court then announced its ruling:

Because the federal imposition of a bond registration requirement on States does not violate the Tenth Amendment and because a nondiscriminatory federal tax on the interest earned on state bonds does not violate the intergovernmental tax immunity doctrine, we uphold the constitutionality of § 310(b)(1), overrule the exceptions to the Special Master's Report, and approve his recommendation to enter judgment for the defendant. (p. 527)

The separate opinions added some complexity to the case. Justice Scalia's opinion concurred with the judgment and with most of the opinion excepting that part dealing with the Tenth Amendment, which was Part II of the opinion. According to Justice Scalia:

I do not read *Garcia* as adopting – in fact I read it as explicitly disclaiming – the proposition attributed to it in today's opinion ... that the “national political process” is the States' only constitutional protection, and that nothing except the demonstration of “some extraordinary defects” in the operation of that process can justify judicial relief. We said in *Garcia*: “These cases do not require us to identify or define what affirmative limits *the constitutional structure* might impose on federal action affecting the States under the Commerce Clause. See *Coyle v. Oklahoma*, 221 U.S. 559 (1911).” 469 U.S., at 556 (emphasis added). (p. 528)

The complexity in Scalia's opinion arose from not knowing his position regarding two key issues: 1) the Tenth Amendment's textual inability to sustain a limiting influence upon a delegated power; and 2) whether the political process serves as a buffer to state sovereignty only in conflicts involving a delegated power, or whether the political process is construed as providing the only buffer in all state-federal conflicts.

Justice Rehnquist offered a separate opinion that concurred in the judgment, but not in the opinion. We know Rehnquist's stance on the previously mentioned issues. Regarding the first key issue, he was not bothered by the Tenth Amendment's textual inability to sustain a limiting influence upon a delegated power. In some undefined way, as stated in his opinion in *National League of Cities*, the Tenth Amendment buffered federal intrusion into state



sovereignty irregardless of whether or not the power had been delegated to the federal government. Regarding the second issue, he rejected the notion that the political process would provide any effective safeguard against federal intrusion into state matters, regardless whether the power had been delegated to the federal government or reserved to the states and the people.

Justice O'Connor dissented from both the opinion and the judgment. O'Connor objected to the Court's overruling of *Pollock*, which is most difficult to understand. As the Court pointed out, *Pollock* had already been effectively overruled on all counts except for bond interest. All the Court did was pronounce official sentence on what was already *a fait accompli*. Also, Justice O'Connor ignored *stare decisis* which helped her propagate yet another propaganda technique, that of the false premise. According to O'Connor, "Federal taxation of state activities is inherently a threat to state sovereignty" (p. 533). However, in 1939 the Court stated in *Graves v. New York ex rel. O'Keefe* (a case to which Justice O'Connor had access since it was cited in the current Court opinion), "The theory ... that a tax on income is legally or economically a tax on its source, is no longer tenable" (p. 520). Thus, the precedent made her phrase "[f]ederal taxation of state activities" a false premise. The false premise was followed two sentences later by O'Connor's use of hyperbole: "If this Court is the States' sole protector against the threat of crushing taxation..." (p. 533). Justice O'Connor's failure to acknowledge the precedent of *Graves v. New York* also permitted her to utilize a logical fallacy, the unwarranted conclusion, which O'Connor combined with hyperbole, as exemplified in her statement, "If Congress may tax the interest paid on state and local bonds, it may strike at the very heart of state of local government activities" (p. 532). The most complicated use of propaganda techniques occurred when Justice O'Connor combined the appeal to fear, slippery slope, unwarranted extrapolation,

and the more subtle form of name calling (the use of words or phrases selected because they possess a negative emotional charge, *e.g.*, tyranny, gutted shell):

Although Congress has taken a relatively less burdensome step in subjecting only income from bearer bonds to federal taxation, the erosion of state sovereignty is likely to occur a step at a time. “If there is any danger, it lies in the tyranny of small decisions – in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.” (p. 533)

Of interest, Justice O’Connor did cite the Guarantee Clause as a possible protection of “the States’ autonomy ... from substantial federal incursions” (p. 531). However, O’Connor failed to clarify how the Guarantee Clause might work to restrain federal action against state sovereignty.

*Significance for the tenth amendment.*

The question remaining after *Garcia*, regarding whether structural restraints (i.e., the political process) would apply only to delegated powers or whether it would be the only safeguard against federal intrusion into state sovereignty, received a partial answer in *South Carolina v. Baker*. A majority of the justices viewed the political process as providing the only restraints upon federal power being imposed upon the states. A minority of the justices opposed that view, believing that the Tenth Amendment provided a restraint against both delegated and assumed powers of the federal government. What remained unclear was the position of Justice Scalia regarding the Tenth Amendment. He clearly rejected the notion that the political process constituted the sole defense of states against federal intrusion. However, it would seem that the Tenth Amendment would serve as a restraint against congressional assumption of nondelegated powers. Whether or not Justice Scalia would ignore the textual difficulties in applying the Tenth Amendment as a limitation upon delegated powers remained an unanswered question.

***New York v. United States, 505 U.S. 144 (1992).***

*Case summary.*

By the early 1980s, 31 of 50 states faced an impending shortage of sites in which to dispose the low-level radioactive waste that was produced within their respective boundaries (p. 144). By 1978 only three states (South Carolina, Nevada, and Washington) had disposal sites in operation (p. 150). However, in 1979 the Nevada and Washington sites shut down (p. 150). At first the shut-downs were temporary, but the governors of both states soon “announced plans to shut their sites permanently” (p. 150). In response, Congress passed the Low-Level Radioactive Waste Policy Amendments Act of 1985 that imposed an obligation upon each state to arrange for the disposal of low-level radioactive waste that was generated within its borders. In addition, Congress provided three sets of incentives to provide motivation for the states to comply with the obligations set forth in the act: 1) monetary incentives by which states with disposal sites could levy a surcharge on wastes received from other sites; 2) access incentives which permitted states with sites to gradually increase “the cost of access to their sites” by other states; and 3) a take title provision by which those states failing to make provision “for the provision of all internally generated waste by a particular date” were required to “take title to and possession of the waste and become liable for all damages suffered ... as a result of the State’s failure” (p. 144). The legislation was “based largely on a proposal submitted by the National Governors’ Association” as a result of a compromise it brokered “among the sited and unsited States” by which “sited States agreed to extend for seven years the period in which they would accept low level radioactive waste from other States. In exchange, the unsited States agreed to end their reliance on the sited States by 1992” (p. 151).

The State of New York, described by the Court as “a State whose residents generate a relatively large share of the Nation’s low level radioactive waste,” and two of its counties filed suit against the United States in federal district court

seeking a declaratory judgment that, *inter alia*, the three incentives provisions are inconsistent with the Tenth Amendment – which declares that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States” – and with the Guarantee Clause of Article IV, § 4 – which directs the United States to “guarantee to every State ... a Republican Form of Government.” (pp. 154; 144)

The original suit also contained arguments that the congressional action violated the Eleventh Amendment and the Due Process Clause requirements of the Fifth Amendment. The U.S. District Court for the Northern District of New York dismissed the suit. When the suit was filed by New York in 1990, the only sited states in the country (South Carolina, Nevada, and Washington) “intervened as defendants” (p. 154). Upon appeal the Court of Appeals for the Second Circuit affirmed the district court’s dismissal. Subsequently the Supreme Court granted *certiorari*. As the Court noted, “Petitioners ... abandoned their due process and Eleventh Amendment claims on their way up the appellate ladder” (p. 154). Seventeen unsited states, plus the Council of State Governments, filed briefs of *amici curiae* in support of New York’s challenge to the Low-Level Radioactive Waste Policy Amendments Act of 1985 (p. 148). Strangely, attorneys for the National Governors’ Conference, whose recommendations basically comprised the challenged legislation, remained noticeable by their noninvolvement in the case. Since the challenge based on the Guarantee Clause was addressed in a previous chapter (see pp. 234-238), this discussion will focus on the Court’s ruling on the Tenth Amendment claims.

Justice O’Connor authored the 6-3 opinion in which the Court ruled that the monetary and access incentives passed constitutional muster, but the take title provision did not. Thus the lower court decisions were affirmed in part and overruled in part. Chief Justice Rehnquist and Justices Souter, Scalia, Kennedy, and Thomas joined Justice O’Connor to form the Court’s majority. Justices Blackmun, White, and Stevens joined in part. Separate opinions were filed by

Justices White and Stevens, which concurred in part and dissented in part from the majority.

Justice White's opinion was joined by Justices Blackmun and Stevens.

Justice O'Connor began by noting the contrasting ages of the two problems involved in the suit, the relative new public policy problem centering on radioactive waste and the "oldest question of constitutional law" centering on "discerning the proper division of authority between the Federal Government and the States" (p. 149). Affected constitutional components included the Commerce Clause, the Spending Clause, the Necessary and Proper Clause, and the Tenth Amendment. After presenting the historical context of the challenged legislation, Justice O'Connor began addressing the central issue, "the task of ascertaining the constitutional line between federal and state power" (p. 155). Questions concerning the Tenth Amendment involved "determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States" (p. 155). According to O'Connor, the question could be examined in either of two different ways. One method involved an inquiry as to "whether an Act of Congress [was] authorized by one of the powers delegated to Congress in Article I of the Constitution" (p. 155). Benchmark cases for this approach included the early *McCullough v. Maryland* (1819) and the more recent *Perez v. United States* (1971). The other method focused on attempts "to determine whether an Act of Congress invade[d] the province of state sovereignty reserved by the Tenth Amendment" (p. 155). Benchmarks for invasions of the Tenth Amendment included *Lane County v. Oregon* (1869) and *Garcia v. San Antonio Metropolitan Transit Authority* (1985). According to Justice O'Connor, the two methods were "mirror images of each other" (p. 156). She continued:

If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on

Congress.... It is in this sense that the Tenth Amendment “states but a truism that all is retained which has not been surrendered.” *United States v. Darby*, 312 U.S. 100, 124 (1941). (p. 156)

Justice O’Connor next linked this principle with a more recent case:

The States unquestionably do retain a significant measure of sovereign authority ... to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government. *Garcia v. San Antonio Metropolitan Transit Authority*, *supra*, at 549. (p. 156)

As in the *National League of Cities v. Usery* opinion, the Court next discussed constitutional limitations on delegated powers. After noting that the First Amendment limited congressional power emanating from the Commerce Clause, Justice O’Connor made a somewhat shocking statement that the Tenth Amendment also acted to restrain a delegated power, but its limiting power did not derive from the text of that amendment.

The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power. (pp. 156-157)

No cases were cited in support of this novel interpretation, not even the *National League of Cities* ruling reaching essentially the same position. Perhaps that was because *Garcia* had subsequently overruled it. Yet the Court now treaded on similar ground.

Unable to find support for her position in either the text of the Tenth Amendment or in existing relevant case law, O’Connor announced that the source of limitations by the Tenth Amendment upon federal exercise of a delegated power lay within the “federal structure” of American government, which provides concrete meaning to the concept of “federalism” (p. 157). Notwithstanding the benefits of federalism, the Court’s task “consists not of devising our

preferred system of government, but of understanding and applying the framework set forth in the Constitution” (p. 157). First noting that the constitutional “framework ha[d] been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government,” Justice O’Connor next observed that “the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role” (p. 157). According to O’Connor, the three major constitutional sources of federal power that converged in this case were the Commerce Clause, the Spending Clause, and the Necessary and Proper Clause, the latter clause serving to guide the “Court’s broad construction of Congress’ power under the Commerce and Spending Clauses” (p. 159). Returning to her mirror image portrayal of the issue posed by the constitutional structure, Justice O’Connor pontificated:

In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether any of the three challenged provisions ... oversteps the boundary between federal and state authority. (p. 159)

After a review of later twentieth century cases involving the Tenth Amendment focused on “the authority of Congress to subject state governments to generally applicable laws,” Justice O’Connor rephrased the primary legal question as a focus upon “the circumstances under which Congress may use the States as implements of regulation” (pp. 160, 161). In beginning the Court’s examination of the preceding question, O’Connor began with a premise derived from a 1981 case:

As an initial matter, Congress may not simply “commandee[r] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.” *Hodel v. Virginia Surface Mining &*

*Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981). In *Hodel*, the Court upheld the Surface Mining Control and Reclamation Act of 1977 precisely because it did *not* [emphasis O'Connor's] "commandeer" the States into regulating mining. (p. 161)

However, O'Connor did not discuss the case law ending with *Garcia* whereby the states did have to adjust their programs, statutes, and administrative law in order to meet federal requirements. O'Connor did not yet address the underlying issue of where the line should be drawn between *Garcia* and "commandeering" a state's legislative processes, not to mention the differences between delegated and nondelegated powers.

Justice O'Connor subsequently discussed *FERC*, noting that the Court observed in that case "that 'this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations. [*FERC v. Mississippi*, 456 U.S. 742], at 761-762'" (p. 161). O'Connor next cited an older case to buttress the contention drawn from *Hodel* and *FERC*:

While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. See *Coyle v. Smith*, 221 U.S. 559, 565 (1911). (p. 162)

Thereafter Justice O'Connor trotted out the same citation from *Texas v. White* used by Justice Rehnquist in *National League of Cities*, a quote which Justice Brennan had found ironic in his dissent of the same case because the legal issue concerned the federal government's authority under the Guarantee Clause to restructure state government following the denial of a republican government caused by an attempted secession.<sup>60</sup> Involving the "quoting out of context" technique, this device was used "to gain credibility for an idea that is not supported by the full context" (see Appendix M; hereafter, refer to Appendix M for information about



identified propaganda techniques discussed in the remainder of this paper). According to Justice O'Connor:

In Chief Justice Chase's much-quoted words, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 7 Wall. 700, 725 (1869). (p. 162)

Lifting another citation from its original context, O'Connor quoted Alexander Hamilton's observation from *The Federalist*:

The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist." The *Federalist* No. 15, p. 108 (C. Rossiter ed. 1961) [emphasis in original]. (p. 163)<sup>61</sup>

Of course, what Justice O'Connor didn't mention was the context of Hamilton's remarks, which took place in the midst of an attempt to reduce the state sovereignty of the Confederation by the adoption of the Constitution, an effort that the Founders recognized required the ability of the federal government to enact legislation directly affecting the people without requiring the approval of each of the states.

O'Connor then proceeded to take remarks made at the Constitutional Convention out of their context as well by citing Edmund Randolph's objections to the New Jersey Plan proposed by William Patterson. Due to the involved and complicated context, the quote will be first presented (see following sentence) followed by an explanation of the context (see pp. 447-449), after which will be presented Justice O'Connor's misuse of the quote (see pp. 449-450).

O'Connor's citation of Randolph was: "Coercion [is] *impracticable, expensive, cruel to*

*individuals.... We must resort therefore to a national Legislature over individuals...* (emphasis in original)” p. 164).

The context for Randolph’s remarks is somewhat more complex than the statement. Resolution six of the New Jersey plan as presented to the Convention dealt with acts and treaties made by Congress, one part of which stated:

[I]f any State, or any body of men in any State shall oppose or prevent ye. carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts,.. (Farrand, I, p. 245)

Of course, since Randolph had offered the Virginia Plan to the Convention, he would speak against the New Jersey Plan, particularly since the New Jersey Plan simply amended the existing Articles of Confederation which meant that Articles II and IX remained intact (except with regards to the specifically delegated powers enumerated by Patterson’s New Jersey Plan).<sup>62</sup> Article II of the Articles read: “Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress” (Rossiter, p. 351). Article IX, ¶ 4 of the Articles read: “The united states in congress assembled shall also have the sole and exclusive right and power of ... regulating the trade ... providing that the legislative right of any state within its own limits be not infringed or violated” (Rossiter, p. 356). Article IX, ¶ 6 of the Articles read: The united states in congress assembled shall never [exercise its delegated powers] ... unless nine states assent to the same” (Rossiter, p. 357).

Randolph’s remarks about “coercion” were made in the context of his opposition to the Articles of Confederation and their entronement of state sovereignty which had impeded national legislation. According to Madison’s notes, “He painted in strong colours [sic], the

imbecility of the existing confederacy, & the danger of delaying a substantial reform” (Farrand, I, p. 253). Given the history of noncompliance by the states with congressional legislation as well as the ineffectiveness resulting from waiting for states to approve what Congress had passed, Patterson’s recommendation for coercion only made sense. If, however, the Articles were replaced as proposed by the Virginia Plan, there would be no need of coercion since the “National Legislature” would be empowered “to legislate in all cases to which the separate States are incompetent” and “to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union” (Farrand, I, p. 21). Thus, in comparing the two plans, Randolph was trying to distinguish the two plans by drawing attention to the openly coercive nature of the New Jersey Plan. Randolph was not opposed to force or coercion in upholding the national government, but he was clever in framing the issue so as to avoid the appearance of naked force. Subsequent to his quoted remark, Randolph noted that the states were “always encroaching on the authority of the U[nited] States. A provision for harmony among the States, as in trade, naturalization &c. – for crushing rebellion whenever it may rear its crest – and for certain other general benefits, must be made” (Farrand, I, p. 256).

Another indication of Randolph’s opposition to the ability of the states under the Articles to impede the national government as well as his support of coercive means to overcome such opposition may be gleaned from the text of Resolution 6 of the Virginia Plan that he had presented to the Convention on May 29th, 1787: “Resolved that ... the National Legislature ought to be empowered [sic] ... to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof” (Farrand, I, p. 21). In short, Randolph did not object to coercive means to achieve the aims of the national government nor did he

support state sovereignty as a vehicle to obstruct national efforts to meet its obligations to the people of the nation.

Given that context, Justice O'Connor's following interpretation lacked any credibility whatsoever. By removing the statement from its context, O'Connor could then attempt to make a false claim (or, at best, an unwarranted assumption), which would be credible to those unfamiliar with the context, the claim being that Randolph was actually opposed to coercion of the states in order to respect national legislation. According to O'Connor, "One frequently expressed objection to the New Jersey Plan was that it might require the Federal Government to coerce the States into implementing legislation" (p. 164). And then she cited Randolph's remark, which was taken so completely out of context as to be given a different interpretation.

To review, given the political context of the time, national legislation under the Articles of Confederation had to first pass muster with the respective state legislatures before the proposal could become law. More importantly, the Articles were construed as acting upon the states, not directly upon the citizens who were first citizens of their respective states. The Constitution would change that by carving out powers by which the federal legislation would act directly on citizens, thus bypassing the intermediary states. Of course, another reality dealt with the fear of strong central governments. Any remarks made at the time need to be considered in light of that context which was far more nuanced than O'Connor would have us believe. Fear of tyranny resulting from a strong central government had driven the revolutionary impulse. However, state sovereignty, which emasculated a central government under the Articles, had not worked. At the time of the Constitutional Convention, there were many points along the continuum between the absolutes of state sovereignty at one end and national sovereignty at the other end that were taken by various individuals at different times and on varying issues. The Founders were

searching for solutions to the failure of the Articles of Confederation. Justice O'Connor would have us ignore that context by creating a false dichotomy consisting of the two extremes. The context in which Randolph's remarks were made focused on discussion regarding the relative merits and disabilities of two plans presented at the Convention. The discussion involved the underlying question of whether to simply amend the Articles by the New Jersey Plan or to replace the Articles and make provision for a stronger central government with reduced, but still existent, state sovereignty through the Virginia Plan. Justice O'Connor continued her opinion by taking other isolated statements made in the ratifying conventions to support her initial contention that Congress may not regulate states. Whether or not they were also, like the previous examples, taken out of context will not be examined further. Given Justice O'Connor's record, perhaps they should be examined at a later date.

Also of importance, O'Connor didn't deal with the case law contradicting such a flat assertion as she made, which was then supported primarily through a somewhat sophisticated use of propaganda techniques that are somewhat difficult to detect. The case law not examined illustrated multiple instances whereby states were required to change state rules, regulations, and laws in order to comply with federal legislation, e.g., *Garcia*'s overruling of *National League of Cities* regarding hours and wages of state employees under Congress use of the Commerce Power in the Fair Labor Standards Act and its subsequent amendments. Of course such an examination would have required that differentiation be made between the case law supporting *Garcia* and O'Connor's coercion contention. The difficulty in providing a clear-cut line of demarcation between the two positions had ultimately proven fatal to *National League of Cities* as a precedent. Also forgotten in the "coercion" discussion was the limitation imposed by the original case cited by Justice O'Connor, *Hodel v. Virginia Surface Mining & Reclamation Assn.*

(1981). The limitation involved “enforc[ing] a federal regulatory program” which was not in an activity that could be constitutionally pre-empted by the federal government vis-à-vis *FERC* (p. 161).

Instead of addressing the preceding legal issues, Justice O’Connor made a somewhat exaggerated, or unsupported, claim for which she provided no supporting evidence.

Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people. By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. (p. 168)

A skeptical observer might wonder how the state government could be viewed as being responsive to the local electorate’s preferences when those local preferences might happen to conflict with the federal requirements the state is “volunteering” to meet, either through encouragement or through conditional spending requirements. One wonders about the attitude of state lawmakers across the nation and whether they felt they remained accountable to local preferences in the wake of *Garcia* and *FERC* as they were changing state rules, regulations, and code to meet federal requirements. Also, from a local perspective, it is often difficult to discern differences between federal encouragement and federal compulsion, e.g., the No Child Left Behind Act.<sup>63</sup> O’Connor did discuss what she meant by the second statement above, but provided no concrete examples. However, the line between coercion and encouragement remained unclear, particularly from the local point of view.

Justice O’Connor focused on each of the three incentives individually as part of the total incentive package contained within the whole act. O’Connor began by stating, “The first set of incentives works in three steps” (p. 171). The first step, authorizing sited states to impose a surcharge on waste received from unsited states, represented “an unexceptionable exercise of

Congress' power" authorized by the Commerce Clause (p. 171). The second step of the first incentive, "the Secretary's collection of a percentage of the surcharge," amounted to "no more than a federal tax on interstate commerce," which was clearly within Congress' commerce powers (p. 171). The third step, the disbursement of the surcharge fund to those states who had waste disposal sites in operation by January 1, 1993, was "a conditional exercise of Congress' authority under the Spending Clause" to place "conditions ... on the receipt of federal funds" (p. 171). Upon examination, Justice O'Connor found they met four of the tests required of conditional spending which were articulated in *South Dakota v. Dole*: first, "[t]he expenditure [was] for the general welfare;" second, [t]he conditions imposed [were] unambiguous;" third, "[t]he conditions imposed [were] reasonably related to the purpose of the expenditure;" and finally, "the conditions imposed by the Act [did not] violate any independent constitutional prohibition" (pp. 172, 173). Justice O'Connor concluded:

The Act's first set of incentives, in which Congress has conditioned grants to the States upon the States' attainment of a series of milestones, is thus well within the authority of Congress under the Commerce and Spending Clauses. Because the first set of incentives is supported by affirmative constitutional grants of power to Congress, it is not inconsistent with the Tenth Amendment. (p. 173)

It is unclear why Justice O'Connor omitted the fifth test related to "economic hardship" should the conditional spending not be accepted by an individual state.

Moving to the second set of incentives that allowed sited states "to increase the cost of access to the sites, and then to deny access altogether, to radioactive waste generated in States that [did] not meet federal deadlines", O'Connor observed that this, too, was "within the power of Congress to authorize the States to discriminate against interstate commerce" (p. 173). Citing case law, O'Connor also noted that Congress had the power "to offer States the choice of regulating that activity [falling within the scope of the Commerce Clause] according to federal

standards or having state law pre-empted by federal regulation” (pp. 173-174). Justice O’Connor issued the Court’s ruling regarding the constitutionality of the second set of incentives:

The Act’s second set of incentives thus represents a conditional exercise of Congress’ commerce power, along the lines of those we have held to be within Congress’ authority. As a result, the second set of incentives does not intrude on the sovereignty reserved to the States by the Tenth Amendment. (p. 174)

Justice O’Connor set an ominous tone at the beginning of her analysis of the third set of incentives by stating, “The take title provision is of a different character [from the previous two sets of incentives]” (p. 174). Two sentences later, O’Connor declared, “In this provision, Congress has crossed the line distinguishing encouragement from coercion” (p. 175). She explained:

The take title provision offers state governments a “choice” of either accepting ownership of waste or regulating according to the instructions of Congress. Respondents [the federal government and sited states] do not claim that the Constitution would authorize Congress to impose either option as a freestanding requirement. (p. 175)

After examining each requirement as if “standing alone,” Justice O’Connor summarized:

Either type of federal action would “commandeer” state governments into the service of federal regulatory purposes, and would for this reason be inconstant with the Constitution’s division of authority between federal and state governments. On the other hand, the second alternative held out to state governments – regulating pursuant to Congress’ direction – would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. (pp. 175-176)

Justice O’Connor continued her line of reasoning:

Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. (p. 176)

O’Connor concluded:



A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, “the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,” *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, [452 U.S.], at 288, an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution. (p. 176)

Addressing the federal government’s argument that states were given latitude in implementing Congress’ plan, O’Connor noted: “This line of reasoning, however, only underscores the critical alternative a State lacks: A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress” (pp. 176-177).

Regarding the government’s contention that “the federal interest is sufficiently important to justify state submission,” Justice O’Connor replied:

No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.... Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents. (p. 178)

In reply to the federal government’s argument “that the Constitution does, in some circumstances, permit federal directives to state governments,” Justice O’Connor noted that the case law offered in support of that argument discussed “the well established power of Congress to pass laws enforceable in state courts,” but, according to O’Connor, didn’t “support” the government’s argument (p. 178). In her explanation, Justice O’Connor finally drew a distinction between “coercive” and constitutionally permissive legislation:

These cases involve no more than an application of the Supremacy Clause’s provision that federal law “shall be the supreme Law of the Land,” enforceable in every State. More to the point, all involve congressional regulation of individuals, not congressional requirements that States regulate. (p. 178)

Justice O’Connor continued:

Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal “direction” of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate. (p. 179)

Addressing the case law upholding “the power of federal *courts* [emphasis O’Connor’s] to order state officials to comply with federal law,” O’Connor again pointed to the Supremacy Clause and to Article III, § 2 regarding the judicial power, and observed, “The Constitution contains no analogous grant of authority to Congress” (p. 179). Detecting an implied power, Justice O’Connor further noted, “Moreover, the Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply” (p. 179). O’Connor concluded:

In sum, the cases relied upon by the United States hold only that federal law is enforceable in state courts and that federal courts may in proper circumstances order state officials to comply with federal law, propositions that by no means imply any authority on the part of Congress to mandate state regulation. (p. 179)

Attorneys for the sited states who had intervened on behalf of the federal government had presented a somewhat more troublesome argument. They had pointed out to the Court “that public officials representing the State of New York lent their support to the Act’s enactment” (p. 181). Sited states’ attorneys also noted “that the Act embodie[d] a bargain among the sited and unsited States, a compromise to which New York was a willing participant and from which New York ha[d] reaped much benefit” (p. 181). Posing the following question, legal counsel for the sited states asked the Court, “How can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute’s enactment” (p. 181)?

The Court responded by first pointing out that the Constitution did not “protect the sovereignty of States for the benefit of the States or state governments” (p. 181). The Court explained:

To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: “Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting). (p. 181)

The Court continued its explanation:

“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Gregory v. Ashcroft*, 501 U.S., at 458. See the Federalist No. 51, p. 323 (C. Rossiter ed. 1961). (pp. 181-182)

According to the Court, when the federal government exceeded its powers, “the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials (p. 182). Suggestive of the notion that no precedents existed, the Court cited no judicial precedents in support of its contention. Instead, the Court drew an analogy to a similar situation, the horizontal separation of powers between the branches of government, for which case law did exist to support the principle that the Constitution was “violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment” (p. 182). Cases cited included *Buckley v. Valeo*, 424 U.S. 1, 118-137 (1976), and *INS v. Chadha*, 462 U.S. 919, 944-959 (1983). The legal principle surrounding the Separation of Powers doctrine applied to both the horizontal separation of powers and the vertical separation of powers. According to the Court:

The constitutional authority of Congress cannot be expanded by the “consent” of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch of the States. State officials thus

cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution. (p. 182)

Furthermore, the Court also noted: “Nor does the State’s prior support for the Act estop it from asserting the Act’s unconstitutionality” (p. 183). Addressing the issue that the Act represented “a compromise among the States,” the Court stated that such an agreement did not “elevate the Act ... to the status of an interstate agreement requiring Congress’ approval under the Compact Clause. Cf. *Holmes v. Jennison*, 14 Pet. 540, 572 (1840) (plurality opinion)” (p. 183).

Concluding its opinion, the Court opined that the Constitution protected “us from our own best intentions” by dividing power “so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day” (p. 187). According to the Court:

States are not mere political subdivisions of the United States. State governments are neither regional offices or administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government’s most detailed organizational chart. The Constitution instead “leaves to the several States a residuary and inviolable sovereignty,” *The Federalist* No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment. (p. 188)

The Court, prior to announcing that it “affirmed in part and reversed in part” the “judgment of the Court of Appeals,” concluded: “Whatever the outer limits of that sovereignty [i.e., state] may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program” (p. 188).

The separate opinion by Justice White, which was joined by Justices Blackmun and Stevens, called attention to Justice O’Connor’s use of the “Suppressed Evidence” propaganda technique without labeling it as such when it observed:

To read the Court’s version of events, see *ante*, at 150-151, one would think that Congress was the sole proponent of a solution to the Nation’s low-level radioactive waste problem. Not so. The Low-Level Radioactive Waste

Policy Act of 1980 ... and its amendatory 1985 Act, resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem. They sought not federal pre-emption or intervention, but rather congressional sanction of interstate compromises they had reached. (pp. 189-190)

Justice White cited actions taken by the State Planning Council on Radioactive Waste Management, the National Governors' Association, and the Governors' Task Force aimed at a federal law to deal with the problem. Justice White also noted that Congress had considered a "'federal' solution," which had encountered strong opposition from "one of the sited State's Senators," Senator Strom Thurmond of South Carolina (p. 192). Senator Thurmond "introduced an amendment to adopt and implement the recommendations of the State Planning Council on Radioactive Waste Management" (p. 192). Thus, "[t]he 'state-based' solution carried the day" and was enacted into law in 1980 (p. 192). However, between passage of the 1980 Act and the January 1, 1986 "'drop-dead' date, on which the regional compacts could begin excluding the entry of out-of-region waste," the "sited States grew increasingly and justifiably frustrated by the seeming inaction of unsited States in meeting the projected actions called for in the 1980 Act" (p. 193). This situation, coupled with the very real danger that the three sited states would begin to exclude radioactive waste from outside their "compact regions," gave rise to the efforts to achieve some sort of compromise between the sited and unsited states (p. 193). Justice White characterized the activity resulting in the 1985 amendments: "In sum, the 1985 Act was very much the product of cooperative federalism, in which the States bargained among themselves to achieve compromises for Congress to sanction" (p. 194). He continued:

Unlike legislation that directs action from the Federal Government to the States, the 1980 and 1985 Acts reflected hard-fought agreements among States as refereed by Congress. The distinction is key, and the Court's failure properly to characterize this legislation ultimately affects its analysis of the take title provision's constitutionality. (p. 194)

In other words, the suppressed evidence technique resulted in a faulty analysis, which in turn gave rise to a faulty conclusion based on only partial evidence.

Justice White also faulted O'Connor's analysis because of its isolated approach and because of its use of the "Straw Man" propaganda technique. It is instructive to follow Justice White's discussion of O'Connor's use of propaganda techniques. First:

Without attempting to understand properly the take title provision's place in the interstate bargaining process, the Court isolates the measure analytically and proceeds to dissect it in a syllogistic fashion. The Court candidly begins with an argument respondents do *not* make: that "the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments." [*Ante*, at 175]. "Such a forced transfer," it continues, "standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. *Ibid.* (Emphasis J. White) (pp. 194-195)

After tracing his own thought processes in reading O'Connor's opinion, Justice White then identified the propaganda technique:

Since this is *not* an argument respondents [the federal government and the sited states] make, one naturally wonders why the Court builds its analysis that the take title provision is unconstitutional around this opening premise. But having carefully built its straw man, the Court proceeds impressively to knock him down. "As we have seen," the Court teaches, "the Constitution does not empower Congress to subject state governments to this type of instruction." *Ante*, at 176. (Emphasis J. White) (p. 195)

As Justice White observed, "Curiously absent from the Court's analysis is any effort to place the take title provision within the overall context of the legislation" (p. 195). Of course, if it had, the majority opinion would not have been able to effectively utilize the straw man technique.

Justice White noted the irony of the situation in which the federal government found itself. In trying to follow the wishes of the states, it found itself crossways of the Court majority:

Congress could have pre-empted the field by directly regulating the disposal of this waste pursuant to its powers under the Commerce and Spending Clauses, but instead it *unanimously* assented to the States' request for

congressional ratification of agreements to which they had acceded.  
(Emphasis J. White) (p. 195)

Justice White clearly favored a different interpretation of the Commerce Clause than did O'Connor who had dismissed respondent attorneys' attempts to provide the take title provision with the "status of an interstate agreement requiring Congress' approval under the Compact Clause," which, given the additional information supplied by Justice White, it appeared to be (p. 183; see also p. 467 of this paper). Quickly summarizing, White placed the act in what he judged to be the correct characterization:

First, the States – including New York – worked through their Governors to petition Congress for the 1980 and 1985 Acts. As I have attempted to demonstrate, these statutes are best understood as the products of collective state action, rather than as impositions placed on States by the Federal Government. (p. 196)

Justice White opined:

The chief executives of the States proposed this approach, and I am unmoved by the Court's vehemence in taking away Congress' authority to sanction a recalcitrant unsited State now that New York has reaped the benefits of the sited States' concessions. (p. 196)

Justice White, after reviewing the measures undertaken by New York to comply with the two Acts, concluded: "[O]ur cases support the view that New York's actions signify assent to a constitutional interstate 'agreement' for purposes of Art. I, § 10, cl. 3" (p. 198). He continued by citing the same case referenced by O'Connor, but, unlike O'Connor, from which he quoted (p. 183):

In *Holmes v. Jennison*, 14 Pet. 540 (1840), Chief Justice Taney stated that "[t]he word 'agreement,' does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, *and upon which both are acting*, it is an 'agreement.' And the use of these terms, 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; ...and we shall fail to execute that evident intention, unless we give to the word

‘agreement’ its most extended signification...” *Id.*, at 572. (Emphasis added). (p. 198)

Justice White also cited and quoted from Justice Jackson’s concurring opinion in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 35-36 (1951), which stated, “*After Congress and sister States had been induced to alter their positions and bind themselves to terms of a covenant, West Virginia should be estopped from repudiating her act*” (Emphasis J. White) (p. 199).

Justice White continued by noting the practical effects of the Court majority’s opinion, “that because [New York] is unwilling to honor its obligations to provide in-state storage facilities for its low-level radioactive waste, *other States with such plants must accept New York’s waste, whether they wish to or not*” (p. 199). White offered a trenchant observation:

The Court’s refusal to force New York to accept responsibility for its own problem inevitably means that some other State’s sovereignty will be impinged by it being forced, for public health reasons, to accept New York’s low-level radioactive waste. *I do not understand the principle of federalism to impede the National Government from acting as referee among the States to prohibit one from bullying another.* (Emphasis added). (p. 199)

Although Justice White did not identify the specific propaganda technique used by Justice O’Connor, his critique, which will follow shortly, revealed a quite sophisticated use by Justice O’Connor of the Suppressed Evidence technique that was combined with the Straw Man fallacy. The combination of the two techniques was sophisticated in that the Straw Man was not set up, as it normally is, to be defeated. Instead this Straw Man would provide the basis for the majority Court’s ruling that state officials could not consent to the incursion of its authority. The Straw Man consisted of the analogy drawn by Justice O’Connor, which did have case law precedents; the Suppressed Evidence was the judicial precedent not cited by O’Connor in her discussion, which, if noted, would have not supported O’Connor’s need to draw an analogy (p. 282; see also pp. 450-451 & 456-457 of this paper).



Justice White began by observing the Court's declaration "that the incursion of state sovereignty 'cannot be ratified by the 'consent' of state officials,' *ante*, at 182, is flatly wrong" (p. 200). Justice White proceeded to provide the context, the holding, and the case that contradicted the Court's assertion:

In a case involving a congressional ratification statute to an interstate compact, the Court upheld a provision that Tennessee and Missouri had waived their immunity from suit. Over their objection, the Court held that "[t]he States who are parties to the compact by accepting it *and acting under it assume the conditions* that Congress under the Constitution attached." *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 281-282 (1959) (Emphasis added). (p. 200)

Describing, but not naming the technique, Justice White indicated he had difficulty understanding how the Court determined which sovereignty to examine and which to ignore, he first recapitulated the holding in *Petty v. Tennessee-Missouri Bridge Comm'n*:

In so holding, the Court determined that a State may be found to have waived a fundamental aspect of its sovereignty – the right to be immune from suit – in the formation of an interstate compact even when in subsequent litigation it expressly denied its waiver. (p. 200)

Then Justice White expressed his difficulty in comprehending the Court's rationale: "I fail to understand the reasoning behind the Court's selective distinctions among the various aspects of sovereignty that may and may not be waived and do not believe these distinctions will survive close analysis in future cases" (p. 200).

Regarding the Court's pronouncement that it did not intend to "revisit the holdings of any of [the "recent cases interpreting the Tenth Amendment"], e.g., *Gregory v. Ashcroft*, *South Carolina v. Baker*, *Garcia v. San Antonio Metropolitan Transit Authority*, *EEOC v. Wyoming*, *National League of Cities v. Usery*, Justice White announced the difficulties he had "with the Court's analysis in this respect" (pp. 160, 201). White elaborated:

[O'Connor's analysis] builds its rule around an insupportable and illogical distinction in the types of alleged incursions on state sovereignty; it derives its rule from cases that do not support its analysis; it fails to apply the appropriate tests from the cases on which it purports to base its rule; and it omits any discussion of the most recent and pertinent test for determining the take title provision's constitutionality. (p. 201)

Justice White next drew attention to O'Connor's use of the Quoting Out of Context propaganda technique (again, without naming it as such), which was then used to support a contention different from the statement's original context. Justice O'Connor used the Quoting Out of Context technique twice in rapid succession involving two separate cases. First, White pointed out, "[T]he Court's 'anticommandeering' principle cannot persuasively be read as springing from the two cases cited for the proposition, *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* ... and *FERC v. Mississippi*" (p. 202). The quote, which O'Connor lifted out of context from *Hodel* and to which she supplied part of the wording, was: "As an initial matter, Congress may not simply 'commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'" (p. 161). Justice White characterized the statement and supplied the legal question in *Hodel*:

That statement was not necessary to the decision in *Hodel*, which involved the question whether the Tenth Amendment interfered with Congress' authority to pre-empt a field of activity that could also be subject to state regulation and not whether a federal statute could dictate certain actions by States; the language about "commandeer-[ing]" States was classic dicta. (p. 202)

White then completed the contextual picture by summarizing and quoting from the Court's holding in *Hodel*.

In holding that a federal statute regulating the activities of private coal mine operators was constitutional, the Court observed that "[i]t would ... be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity." 452 U.S., at 292. (p. 202)

The second quote O'Connor lifted out of context came from *FERC*. According to O'Connor, "We observed that 'this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations'" (p. 161). As Justice White observed the effects of O'Connor's use of the Quoting Out of Context technique, "In so reciting, the Court extracts from the relevant passage in a manner that subtly alters the Court's meaning" (p. 203).

White then provided the full quotation:

*While this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, cf. EPA v. Brown, 431 U.S. 99 (1977), there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions. Ibid. (citing Fry v. United States, 421 U.S. 542 (1975) (Emphasis added). (p. 203)*

In other words, the use of the Quote Taken Out of Context technique was used by O'Connor to derive a false premise upon which was subsequently drawn a false conclusion.

Much in the way a tutor would address a student's mistake, Justice White observed, "Moreover, it should go without saying that the *absence* of any on-point precedent from this Court has no bearing on the question whether Congress has properly exercised its constitutional authority under Article I" (Emphasis in original) (p. 203). White added, "Silence by this Court on a subject is not authority for anything" (p. 203). Much harder hitting criticism about the majority opinion's lack of proper legal reasoning, as well as its improper reasoning, followed immediately:

The Court can scarcely rest on a distinction between federal laws of general applicability and those ostensibly directed solely at the activities of States, therefore, when the decisions from which it derives the rule not only made no such distinction, but validated federal statutes that constricted state sovereignty in ways greater than or similar to the take title provision at issue in these cases. (pp. 203-204)

Specifically spelling out the fact that not only did the cases cited by O'Connor not support her conclusion, they also directly contradicted her assertion re: directing the states, Justice White noted, "As *Fry*, *Hodel*, and *FERC* make clear, our precedents prior to *Garcia* upheld provisions in federal statutes that directed States to undertake certain actions" (p. 204).

Justice White next observed a critical omission by the Court's majority, which amounted to the Suppressed Evidence technique. The Court relied upon *FERC* through use of the Quoting Out of Context technique in order to reach an unsupported conclusion, i.e., the Court never sanctioning explicit "federal commands to the States to promulgate and enforce laws and regulations" (pp. 161, 202). However, having announced its reliance upon *FERC*, the Court proceeded to ignore the "test stated in *FERC* for determining the circumstances [whereby Congress could or could not "dictate that the States take specific actions"]," a somewhat sophisticated use of the Suppressed Evidence technique because of its nexus with other propaganda techniques (p. 204). According to White, "The crucial threshold inquiry in that case [*FERC*] was whether the subject matter was pre-emptible by Congress" (p. 204). Noting that the O'Connor majority had conceded that Congress was legislating in a pre-emptible field in the current case, White continued explaining the test applied by the *FERC* Court, which occurred before the *Garcia* decision:

[T]he proper test before our decision in *Garcia* was to assess whether the alleged intrusions on state sovereignty "do not threaten the States' 'separate and independent existence,' *Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Coyle v. Smith*, 221 U.S. 559, 580 (1911), and do not impair the ability of the States 'to function effectively in a federal system.' *Fry v. United States*, 421 U.S., at 547, n. 7; *National League of Cities v. Usery*, 426 U.S., at 852." *FERC*, *supra*, at 765-766. (p. 204)

After applying the two-pronged *FERC*, pre-*Garcia* test, Justice White concluded, “On neither score does the take title provision raise constitutional problems” (pp. 204-205). White explained:

It [the take title provision] does not threaten New York’s independent existence nor impair its ability to function effectively in the system, all the more so since the provision was enacted pursuant to compromises reached among state leaders and then ratified by Congress. (p. 205)

The preceding information perhaps explains why the Court majority chose to ignore the basic test contained within a case, a case from which a quote was taken out of context and used to falsely derive a key proposition central to the Court’s ruling.

Justice White was troubled by the Court majority’s use of “selective quotations,” of the attempt to substitute “historical analysis” for existing case law in an attempt to provide “elaborate window dressing,” to the “scanty textual support for the majority’s position,” and finally to a reading of history done “so selectively as to restrict the proper scope of Congress’ powers under Article I, especially when the history not mentioned by the majority fully supports a more expansive understanding of the legislature’s authority” (p. 207, n. 3). Because of these problems, White noted, “[T]he Court’s civics lecture has a decidedly hollow ring” (p. 207).

Justice White concluded by illustrating the irony of the majority’s decision:

The ultimate irony of the decision today is that in its formalistically rigid obeisance to “federalism,” the Court gives Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems. This legislation was a classic example of Congress acting as arbiter among the States... (p. 210)

White continued:

The States urged the National Legislature not to impose from Washington a solution to the country’s low-level waste management problems. Instead, they sought a reasonable level of local and regional autonomy consistent with Art. I, § 10, cl. 3, of the Constitution. (p. 210)

Justice White concluded by noted the additional complications placed upon state sovereignty by the Court's majority opinion.

By invalidating the measure designed to ensure compliance for recalcitrant States, such as New York, the Court upsets the delicate compromise achieved among the States and forces Congress to erect several additional formalistic hurdles to clear before achieving exactly the same objective. (p. 210)

An irony not noted by Justice White involved the refusal of the O'Connor opinion to acknowledge the 1980 and 1985 Acts as interstate compacts. Supposedly concerned about state sovereignty, the O'Connor majority opinion denied the one vestige of state sovereignty remaining from the colonial days, the power of states under Article I, § 10 of the Constitution to form agreements with other states with the consent of Congress. Although Justice White noted this power, he didn't describe it as did a professor of American constitutional history: "As a vestige of the power to make treaties enjoyed by sovereign nations, the Constitution (Art. I, sec. 10) permits states, with the consent of Congress, to enter into an agreement or compact with another state" (Hall, 1992, p. 438). The professor further noted that "interstate compacts was a means by which states retain control over some local issues and preserve a modicum of power in an increasingly centralized polity" (Hall, 1992, p. 438). Such interstate compacts were described as the "hope of many students of federalism ... that interstate cooperation ... could provide an alternative to consolidation of policy making in the national government" (Hall, 1992, p. 438).

Justice Stevens' dissent also noted the incorrectness of O'Connor's position "that Congress does not have the power to issue 'a simple command to state governments to implement legislation enacted by Congress'" (p. 211). Such a notion was "incorrect and unsound" (p. 211). According to Justice Stevens:

There is no such limitation in the Constitution. The Tenth Amendment surely does not impose any limit on Congress' exercise of the powers

delegated to it by Article I. Nor does the structure of the constitutional order or the values of federalism mandate such a formal rule. (p. 211)

In a separate note, Justice Stevens supported his contention that the Tenth Amendment imposed no restraints upon congressional exercise of a delegated power by citing *United States v. Darby*:

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. (p. 211, n. 2)

In addition to citing relevant case law, Justice Stevens conducted a brief historical analysis.

According to the Articles of Confederation, “the Federal Government had the power to issue commands to the States” (p. 210).<sup>64</sup> After citing the specific articles providing that power, Stevens observed:

Because that indirect exercise of federal power proved ineffective, the Framers of the Constitution empowered the Federal Government to exercise legislative authority directly over individuals within the States, even though that direct authority constituted a greater intrusion on state sovereignty. (p. 210)

Justice Stevens concluded his brief historical analysis by noting the purpose of the Constitution’s displacement of the Articles of Confederation: “Nothing in that history suggests that the Federal Government may not also impose its will upon the several States as it did under the Articles. The Constitution enhanced, rather than diminished, the power of the Federal Government” (p. 210). This was yet another slice of history neglected by the Court majority’s opinion, which represented either an incomplete analysis or use of the Suppressed Evidence propaganda technique.

Justice Stevens discussed yet another omission by the O’Connor opinion. This suppressed evidence focused on the “body of ‘interstate common law’” crafted by the Court, which supported the assertion, “The Constitution gives this Court the power to resolve controversies

between the States” (pp. 212, 211). The particular body of interstate common law dealt with “disputes between States involving interstate waters” (p. 212) with four cases being cited in support of the assertion. As Justice Stevens noted, “In such contexts, we have not hesitated to direct States to undertake specific actions” (p. 212). Finally, Justice Stevens pointed out that 44 states had joined regional interstate compacts, all of which incorporated “take title provision” (p. 212, n. 3). He further observed, “These compacts, the product of voluntary interstate cooperation, unquestionable survive the ‘invalidation’ of [the take title provision] as it applies to New York” (p. 212, n. 3).

*Significance for the tenth amendment.*

A key question (Can government officials consent to an unconstitutional infringement of their sovereign powers by another branch or level of government?) appeared to be answered by the majority opinion. However, no case law directly bearing on the point of federal infringement of state sovereignty was cited by O’Connor. Also, O’Connor’s use of propaganda techniques to obtain her answer casts further doubts upon the continued viability of her answer beyond the immediate case, the majority opinion notwithstanding. Justices White and Stevens placed severe doubt upon the majority opinion’s answer by citing case law bearing upon the federal-state aspect of the question. As a result, it is difficult to discern how future judicial opinions will answer the question.

More troubling was the absence in the majority opinion of sound legal reasoning that considers all aspects and legal issues bearing on the case at hand. In its place one found propaganda techniques employed profusely throughout the opinion to achieve a desired result, a finding that the Tenth Amendment serves to limit a delegated power despite the absence of any textual support for that position, either directly or by implication. The fault lines of an issue as



old as this country's political history continued to shift centuries later, revealing the old divide. The fault reveals an issue so deeply embedded in American polity that apparently trickery is justified in order to maintain the viability of a position lying on one's preferred side of the fault. So deep-seated is the issue that six justices signed on to the majority opinion in spite of the pervasive use of propaganda techniques utilized to reach the Court's position. It appeared as if judgment was reached instinctively without careful analysis, and was followed by a search for reasons. The case had points that would have provided constitutional problems for NCLB; however, the legitimacy of the points is problematic. Because of the combined use of propaganda techniques and absence of legitimate legal reasoning, it is most difficult to discern the significance of this case regarding the Tenth Amendment. The points raised by Justice White's dissent will be most difficult to ignore, let alone refute.

***Printz v. United States, 521 U.S. 898 (1997).***

*Case summary.*

In 1968 Congress enacted the Gun Control Act establishing "a detailed federal scheme governing the distribution of firearms" under its commerce powers (p. 902). The Brady Act, passed by Congress in 1993, amended the Gun Control Act by requiring the Attorney General "to establish a national instant background-check system" by a certain date (p. 902). During the interim period before the Attorney General's system became operative, the Brady Act required firearms dealers to do the following before selling a handgun to a customer:

- receive a completed Brady Form listing the purchaser's name, address, and date of birth "along with a sworn statement that the [purchaser was] not among any of the classes of prohibited purchasers" (p. 903).
- verify the identity of the handgun purchaser via an identification document.

- send a copy of the Brady Form to the “chief law enforcement officer” (CLEO) in which the purchaser resided (p. 903).
- wait for five business days (“unless the CLEO earlier notifies the dealer that he has no reason to believe the transfer would be illegal”) to complete the sale (p. 903).

Congress created two exceptions to the scheme detailed above, which had the effect of dividing states into two classifications, those with some type of system for background checks and those without any provision for background checks. First, gun dealers could sell a handgun immediately if the purchaser presented “a state handgun permit issued after a background check” (p. 903). Second, dealers could also sell a handgun immediately if state law provided for “an instant background check” (p. 903). In states without either of the above provisions, the Brady Act required the CLEO “to perform certain duties” (p. 903). These duties included making “a reasonable effort to ascertain within 5 business days” whether the purchaser was in a class prohibited from owning handguns (p. 903). Although the Brady Act did not require the CLEO to notify the gun dealer in those instances determined to be illegal, the Act did require the CLEO to “provide the would-be purchaser with a written statement of the reasons for that determination” if requested to do so (p. 904). The Act also required the CLEO to destroy the records in his or her possession if the sale did not violate the Act’s provisions regarding eligibility for handgun ownership.

Jay Printz, the Sheriff for Ravalli County, Montana, filed suit in the U.S. District Court for the District of Montana challenging the constitutionality of the Brady Act’s requirements. In particular, he objected “to being pressed into federal service” and contended “that congressional action compelling state officers to execute federal laws” was unconstitutional (p. 905). The federal district court in Montana ruled that the background check requirement was

unconstitutional. The lower federal court also ruled that this portion was severable from the Act, which, in effect, left “a voluntary background-check system in place” (p. 904). Similarly, Richard Mack, Sheriff of Graham County, Arizona, filed suit in the U.S. District Court for the District of Arizona. The U.S. District Court in Arizona also ruled that the background check requirement by state and local law enforcement officials was both unconstitutional and severable. Both cases were appealed to the Court of Appeals for the Ninth Circuit where they were consolidated. In a divided opinion the Ninth Circuit Court reversed the district court rulings, ruling that “none of the Brady Act’s interim provisions” violated the Constitution (p. 904). Upon appeal, the Supreme Court granted certiorari.

Justice Scalia delivered the 5-4 majority opinion, which overruled the Ninth Circuit Court of Appeals ruling and upheld the initial district court holdings. Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Thomas joined Justice Scalia to form the five-member majority. Justices Stevens, Souter, Ginsburg, and Breyer dissented. Justice Stevens filed a dissenting opinion, which was joined by the other dissenting justices. Justice Breyer also filed a dissenting opinion, which was joined by Justice Stevens.

Noting that there was “no constitutional text speaking ... to the CLEOs’ challenge,” Justice Scalia stated that the answer to the legal question involved “must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court” (p. 905). Regarding historical practice, Scalia first confronted the U.S. Government’s contention “that ‘the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws,’ Brief for United States 28” (p. 905). The examples cited by the Government included statutes requiring state courts “to record applications for citizenship ... and to transmit abstracts of citizenship applications ... to the Secretary of

State,” to hear “claims of slave owners who had apprehended fugitive slaves,” to order “the deportation of alien enemies in times of war,” and to take “proof of the claims of Canadian refugees who had assisted the United States during the Revolutionary War” (pp. 906, 907).

According to Scalia:

These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power. That assumption was perhaps implicit in one of the provisions of the Constitution, and was explicit in another. (Emphasis in original) (p. 907)

The implicit assumption derived from Article III, § 1 of the Constitution that created the Supreme Court and left the creation of lower federal courts to Congress “even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States” (p. 907). The explicit requirement that state courts enforce federal law derived from the Supremacy Clause of the Constitution contained in Article VI, cl. 2, which stated that “the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby” (p. 907). Continuing, Justice Scalia announced:

For these reasons, we do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service. Indeed, it can be argued that the numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States’ executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power. (Emphasis in original) (pp. 907-908)

Justice Scalia also noted that the only congressional action imposing a duty upon “state executive officers” to arrest and deliver “fugitive[s] from justice” from other states was the Extradition Act of 1793, which, as Scalia pointed out, “was in direct implementation ... of the Extradition Clause of the Constitution itself, see Art. IV, § 2” (p. 909).

Continuing the majority opinion's examination of historical practice as presented by attorneys for the U.S. Government, Justice Scalia moved to the latter nineteenth century and early twentieth century legislation by observing, "[W]e must note that there is not only an absence of executive-commandeering statutes in the early Congresses, but there is an absence of them in our later history as well, at least until very recent years" (p. 916). Noting an immigration act passed in 1882 that "enlisted state officials 'to take charge of the local affairs of immigration in the ports within such State,'" Scalia observed:

The statute did not, however, *mandate* those duties, but merely empowered the Secretary of the Treasury "to *enter into contracts* with such State ... officers as *may be designated* for that purpose *by the governor* of any State." (Emphasis added). (p. 916)

Justice Scalia next focused attention on the selective service act passed during World War I, which

authorized the President "to utilize the service of any or all departments and any or all officers or agents of the United States *and of the several States, Territories, and the District of Columbia, and subdivisions thereof*, in the execution of this Act," and made any person who refused to comply with the President's directions guilty of a misdemeanor. Act of May 18, 1917, ch. 15, § 6, 40 Stat. 80-81 (Emphasis added). (pp. 916-917)

Noting that it was "far from clear that the authorization 'to utilize the service' of state officers was an authorization to *compel* the service of state officers," Scalia drew attention to what President Wilson actually did in implementing the requirements of the Selective Service Act by observing, "It is interesting that in implementing the Act President Wilson did not commandeer the services of state officers, but instead requested the assistance of the States' Governors" (Emphasis in original) (p. 917). According to Scalia's synopsis of events, the President "requested [the governors] to act under the regulations and rules prescribed by the President ..., obtained the consent of each of the Governors, ... and left it to the Governors to issue orders to

their subordinate state officers” (p. 917). Scalia observed, “It is impressive that even with respect to a wartime measure the President should have been so solicitous of state independence” (p. 917).

Concluding the Court majority’s review of historical precedence as cited by attorneys for the U.S. Government, Scalia turned to congressional legislation “enacted within the past few decades” that “require[d] the participation of state or local officials in implementing federal regulatory schemes” (p. 917). Without mentioning any specific legislative acts, Scalia divided them into two categories, those “more accurately described as conditions upon the grant of federal funding than as mandates to the States” and those acts requiring “only the provision of information to the Federal Government” (pp. 917-918). The Court majority found these legislative acts to be “of little relevance” because they did “not involve the precise issue before us here, which is the forced participation of the States’ executive in the actual administration of a federal program” (p. 918). Scalia concluded, “Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice” (p. 918).

In addition to citing previous legislation in support of its position, the U.S. Government also cited portions of *The Federalist*, which dealt with critical remarks by opponents of the proposed Constitution that “Congress’s power to tax will produce two sets of revenue officers” (p. 910). Hamilton responded in Federalist No. 36 that Congress would “probably ‘make use of the State officers and State regulations, for collecting’ federal taxes,” while Madison noted in Federalist No. 45 that “the eventual collection [of internal revenue] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States” (p. 910). Justice Scalia did not find these statements relevant. According to Scalia:

But none of these statements necessarily implies – what is the critical point here – that Congress could impose these responsibilities *without the consent of the States*. They appear to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government, ... an assumption proved correct by the extensive mutual assistance the States and Federal Government voluntarily provided one another in the early days of the Republic, see generally White, [The Federalists (1948)], at 401-404, including voluntary *federal implementation of state law*... (Emphasis in original) (pp. 910-911)

Justice Scalia next confronted a passage from *The Federalist*, which was not cited by the U.S. Government, but upon which Justice Souter and others relied in the two dissents. The passage was written by Alexander Hamilton and follows as cited in the majority opinion.

It merits particular attention ... that the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial in each State will be bound by the sanctity of an oath. Thus, the legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws. The Federalist No. 27, at 177 (A. Hamilton) (Emphasis in original). (p. 911)

According to Scalia, Justice Souter interpreted the phrases “will be incorporated into the operations of the national government” and “will be rendered auxiliary to the enforcement of its laws” to mean that the federal government would have “authority ..., when exercising an otherwise legitimate power (the commerce power, say), to require state ‘auxiliaries’ to take appropriate action” (pp. 911-912). The major objection, in Justice Scalia’s opinion, was that such an interpretation would make “state *legislatures* subject to federal direction,” which would conflict with the holding in *New York v. United States* “that state legislatures are *not* subject to federal direction” (Emphasis in original) (p. 912). A significant problem with Scalia’s position in using the *New York* holding to refute Justice Souter’s interpretation is that the *New York* ruling was reached through a marked use of propaganda techniques in place of solid legal reasoning by

a divided Court (see previous discussion of *New York v. United States*). Justice Scalia was on sounder legal footing when he subsequently argued that Hamilton's remarks should be interpreted to mean

nothing more (or less) than the duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid. (Emphasis in original) (p. 913).

Strangely, Scalia didn't cite Hamilton's own clarification of the meaning of his remarks, which Hamilton provided four pages later. Hamilton stated:

Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the central government.... It may safely be received as an axiom in our political system that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. (Federalist No. 28, p. 149)

Instead of citing the previous remarks by Hamilton, Justice Scalia took a circuitous route that avoided Hamilton and involved inferential reasoning based upon suppositions and discredited source interpretations. This allowed Scalia later to set up a false dichotomy, a division between Hamilton & Madison in *The Federalist*. The false dichotomy of *The Federalist* permitted Scalia to set up Hamilton as a straw man in reference to the question at hand, a proponent of the federal government running roughshod over state powers without any constitutional check. Having set up Hamilton as a straw man, Scalia then employed an ad hominem attack to discredit Hamilton.

Omitting Hamilton's clarification in No. 28 also allowed Scalia to make a false half-claim:

Even if we agreed with Justice Souter's reading of *The Federalist* No. 27, it would still seem to us most peculiar to give the view expressed in that one piece, not clearly confirmed by any other writer, the determinative weight he does. That would be crediting the most expansive view of federal authority ever expressed, and from the pen of the most expansive expositor of federal power. (p. 916, n. 9)



Of course, Souter's interpretation was not necessarily confirmed by either Hamilton or Madison in writing as Publius, the pseudonymic author of *The Federalist*; it could be, in fact, contradicted regarding the issue at hand by focusing on an interpretation of the critical phrase, "as far as its just and constitutional authority extends," as rendering the action unconstitutional, an interpretation which could be supported by Hamilton's discussion of power in Federalist No. 28 referenced on the preceding page (Federalist No. 27, p. 177). Scalia then proceeded to both paraphrase and partially quote a secondary source. According to Scalia, "[I]t is widely recognized that 'The Federalist reads with a split personality' on matters of federalism," itself a questionable assertion not backed up by any supporting evidence (p. 916, n. 9). In fact, Scalia had to go back as far as 1948 to find a source to back his questionable assertion regarding a "schizophrenic Publius," a characterization effectively refuted by the award-winning and noted historian, Garry Wills, in *Explaining America: The Federalist*, which was first published some 33 years after the work cited by Scalia, but some 16 years prior to Scalia's opinion in *Printz* (Wills, 1981/2001, p. 73). In light of Scalia's slanted selectivity, it is instructive to review the introductory comments Professor Wills presented in his work.

Though the assembled "numbers" of the series [*The Federalist*] transcended its original purpose, those writing the Numbers never forgot that purpose, nor should we. The argument is focused on the objections to the Constitution raised by the Anti-Federalists – that the new government would swallow up the states, that too much power was given it, that the Articles of Confederation could still be made to work (with a little tinkering). (Wills, 1981/2001, p. ix)

Wills continued by noting the logic of *The Federalist's* central argument:

Much of the time Publius is being placatory, emphasizing that the states still have a role to play (which is why "federalist" would later be taken as more a defense of the states than of the federal government, a view that misreads the logic of the argument – which is for the new *federal* power). (Emphasis in original) (Wills, 1981/2001, p. ix)

After discussing both the purpose and the central argument of *The Federalist*, Wills directly confronted the mistaken notion of any duality in Publius' writings in *The Federalist*:

The two main authors of the series knew what their task was, and made a common front in performing it. Those who look for any deep difference between them as they work in the same trench together are forgetting the occasion. I emphasized this by taking passages from Madison that sound "Hamiltonian," and from Hamilton that sound "Madisonian," in terms of later stereotypes formed of the two men. (Wills, 1981/2001, p. ix)

Of course, neither Wills' work nor Hamilton's own words suited Scalia's purpose. Scalia then made Souter's interpretation of Hamilton's particular remarks a straw fact, which he then knocked down:

To choose Hamilton's view, as Justice Souter would, is to turn a blind eye to the fact that it was Madison's – not Hamilton's – that prevailed, not only at the Constitutional Convention and in popular sentiment, but in the subsequent struggle to fix the meaning of the Constitution by early congressional practice. (p. 916, n. 9)

It is interesting to note that in knocking down the straw man he created, Scalia had to resort to making a false claim that it was Madison who alone fixed "the meaning of the Constitution by early congressional practice" (p. 916, n. 9). Of course, Madison did much to fix the meaning of the Constitution as a House member, but such a claim ignored the work done by Hamilton as Secretary of the Treasury in writing legislation to get the nation back on its feet economically. And, in the constitutional showdown resulting from Hamilton's proposals, it was Hamilton who prevailed, not Madison (See Appendix J; see also previous discussion of the historical background in the section "Hamilton's Economic Proposals for America: Resolution of the Constitutional Conflict by President Washington and its Aftermath"). Such a claim by Scalia also ignored Madison's role in promoting the ideology leading to nullification, secession, and state rights' support of the "Separate But Equal" socio-legal doctrine, as well as Madison's

reversals on and calling into question the role of judicial review, the very activity in which Scalia was currently engaged (see previous discussion of the historical background under “The Kentucky & Virginia Resolutions and Their Subsequent Influence”; see also Appendix L). And, finally, Scalia’s claim ignored the mischief Madison created regarding treaty making, another instance in which neither Madison’s opinion nor his proposed course for congressional action prevailed (see Appendix K). Of course, all these developments were subsequent to *The Federalist*, a political enterprise in which Hamilton and Madison were in agreement with each other.

Justice Scalia dealt with the prior record of congressional practice in convincing fashion with solid legal reasoning. In his response to *The Federalist*, however, he was less convincing as he felt the need to use propaganda techniques to make his case instead of using solid argumentation. If he had used legitimate argumentation supported by valid evidence, he could have refuted Justice Souter’s interpretation of Hamilton’s quotation. However, he would not have been able to present a Madisonian version of Publius as the champion of state rights, a position not supported by *The Federalist*, but supported by Madison’s later actions regarding the Kentucky and Virginia Resolutions (see previous discussion of the historical background under “The Kentucky & Virginia Resolutions and Their Subsequent Influence”).

Justice Scalia next turned to “consideration of the structure of the Constitution, to see if [the Court] can discern among its ‘essential postulate[s] ... a principle that controls the present cases” (p. 917). Scalia began by citing *Gregory v. Ashcroft* dicta “that the Constitution established a system of ‘dual sovereignty,’” a case decided in 1991 by a 5-4 Court majority, hardly an auspicious precedent (p. 917). It would seem that such a fundamental point would possess a more extensive record of case law, but the only case cited in its support was a 1990

decision. Having previously set up Madison as the spokesperson for state rights, Scalia paraphrased and partially quoted his statement in Federalist No. 39, the principles forming the basis of the Tenth Amendment. According to Scalia, “Although the States surrendered many of their powers to the new Federal Government, they retained ‘a residuary and inviolable sovereignty,’ The Federalist No. 39, at 245 (J. Madison)” (pp. 918-919). Scalia next trotted out the conservative majority’s favorite citation, *Texas v. White*, using dicta from a decision whose context and holding contradicted Scalia’s purpose in quoting it (See previous discussion of the Court’s original decision in *Texas v. White*; for Rehnquist’s use of the dicta from *Texas v. White*, see discussion of his majority opinion in *National League of Cities*; for Brennan’s criticism of Rehnquist’s use of that dicta, see discussion of J. Brennan’s dissent in *National League of Cities*; for O’Connor’s use of the *Texas* dicta in her majority opinion, see discussion of *New York v. United States*). Justice Scalia moved to firmer ground when he began listing examples of the Constitution’s text that revealed the residual sovereignty of the states:

“[T]he prohibition on any involuntary reduction or combination of a State’s territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the “Citizens” of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which “presupposes the continued existence of the states and ... those means and instrumentalities which are the creation of their sovereign and reserved rights,” *Helvering v. Gerhardt*, 304 U.S., 405, 414-415 ... (1938). (p. 919)

Justice Scalia also surmised that a “[r]esidual state sovereignty” was implied by Article I, § 8, which listed powers delegated by the Constitution to Congress; the same “[r]esidual state sovereignty” was made explicit by the Tenth Amendment (p. 919).

In discussing the reasons for abandoning the Articles of Confederation and moving towards the Constitution, Scalia relied upon the arguments made by Justice O’Connor in *New*

*York v. United States* regarding acting upon individuals as opposed to states, arguments that did not involve legal reasoning, but instead relied upon the use of propaganda techniques to reach an unsupported position (See the previous discussion of *New York v. United States* for the following: O'Connor's use of propaganda techniques, White's separate opinion noting O'Connor's use of propaganda techniques, Stevens' separate opinion noting O'Connor's use of propaganda techniques). Scalia then noted that Justice Stevens' dissenting argument had been "squarely rejected by the Court in *New York*" (p. 920, n. 10). What Scalia didn't note was that it was rejected through the use of propaganda techniques, not through logical reason supported by evidence. It appeared that Justice Scalia believed two wrongs make a right. Justice Scalia moved to firmer ground in discussing federalism's benefits and design that provided for "two political capacities, one state and one federal, each protected from incursion by the other" as articulated by the Court in *U.S. Term Limits, Inc. v. Thornton* as derived from, in addition to Hamilton and Madison in *The Federalist*, abundant case law (p. 920). By citing specific constitutional text and discussing federalism as interpreted through case law, Justice Scalia provided what was missing from Justice O'Connor's opinion in *New York*, fleshed-out, concrete examples of the constitutional structure supporting a residual state sovereignty.

Justice Scalia also noted an additional problem with the Brady Act's requirements for CLEOs, its impact upon "the separation and equilibrium of powers between the three branches of the Federal Government itself" (p. 922). Scalia explained:

The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed.... The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). (p. 922)

Justice Scalia observed that the Framers had insisted “upon unity in the Federal Executive – to ensure both vigor and accountability” (p. 922). Scalia concluded, “That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws” (p. 923).

Turning to the case law underlying the issue at hand, Justice Scalia pointed out its relatively recent emergence.

Federal commandeering of state governments is such a novel phenomenon that this Court’s first experience with it did not occur until the 1970’s, when the Environmental Protection Agency promulgated regulations [under congressional authorization] requiring States to prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes. (p. 925)

When the EPA regulations had been challenged in court, the “Courts of Appeals for the Fourth and Ninth Circuits,” as well as the “District of Columbia Circuit” Court, invalidated the regulations (p. 925). On appeal the cases were consolidated into one case, *EPA v. Brown* (see previous discussion of *EPA v. Brown*, 431 U.S. 99, located in the previous chapter’s presentation of the Guarantee Clause case law). Justice Scalia misstated the situation somewhat when he declared, “After we granted certiorari to review the statutory and constitutional validity of the regulations, the Government declined even to defend them, and instead rescinded some and conceded the invalidity of those that remained” (p. 925). What actually transpired was that, during the appeal process, the EPA changed the challenged provisions so that they were no longer offensive to the states, a change that was noted by U.S. Government attorneys in oral argument before the Court:

[F]ederal attorneys stated the changed position of the EPA which the Court included in its ruling: “The Administrator ... concedes the necessity of removing from the regulations all requirements that the States submit legally

adopted regulations; the [Administrator's] regulations contain no requirement that the State adopt laws" (431 U.S. 99, 103). (p. 240 of this paper)

Interestingly, although provided with the opportunity, Scalia did not quote from either of the three Circuit Court rulings invalidating the EPA regulations. In light of Scalia's opinion that this is the first time the issue of federal commandeering of state governments for regulatory purposes confronted the courts, such an omission raises questions about motive and purpose, especially given such relevant lower court dicta in alignment with both the holding of the case and the current issue. Consider this linkage of the Tenth Amendment and the Guarantee Clause by state attorneys:

[T]he Commerce Power does not extend to requiring a state to undertake such *governmental* tasks as might be assigned to it by Congress, or its proper delegate, with respect to activities which admittedly are within reach of the Commerce Power. The Constitution's Tenth Amendment and Article IV, Section 4, which obligates the United States to guarantee to every state a Republican Form of government, precludes such an extension of the Commerce Power.... Moreover, insofar as the Necessary and Proper Clause is concerned the petitioners contend that the means, compulsory state administration and enforcement, is inappropriate and inconsistent with the letter and spirit of the Constitution. (*Brown v. Environmental Protection Agency*, 521 F.2d 827, 838)

Also, consider the Court of Appeals response to the above argument:

To treat the governance of commerce by the states as within the plenary reach of the Commerce Power would in our opinion represent such an abrupt departure from previous constitutional practice as to make us reluctant to adopt an interpretation of the Clean Air Act which would force us to confront the issue. Such treatment, for example, would authorize Congress to direct the states to regulate any economic activity that affects interstate commerce in any manner Congress sees fit.... A commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress. (*Brown v. Environmental Protection Agency*, 521 F.2d 827, 839)

Or reflect upon this quote that would have connected the Rehnquist Court with an issue extending all the way back to the Marshall Court, not to mention the prior existence of the fault line between central and local governments predating the Marshall Court:

We hasten to point out that our reluctance to accept the Administrator's interpretation of the Act is not an effort at this late date to ignore Chief Justice Marshall's triumph over Mr. Jefferson with regard to the power of the Federal government *vis-à-vis* the states. Our concern, as we believe was Justice Marshall's, is to preserve and protect a strong government of the United States and viable governments of the states. (*Brown v. Environmental Protection Agency*, 521 F.2d 827, 840)

Finally, consider the Ninth Circuit Court's citation of a previous Supreme Court ruling, also ignored by Scalia:

Finally, we are encouraged by the Supreme Court's footnote 7 in *Fry v. United States*. In describing the Tenth Amendment, it was said in the footnote: "The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 421 U.S. at 547 n.7, 95 S.Ct. at 1795. (*Brown v. Environmental Protection Agency*, 521 F.2d 827, 842)

Of course, these decisions occurred before Rehnquist replaced Burger as Chief Justice, before O'Connor replaced Stewart and Scalia replaced Rehnquist as justices, and before the Court enjoyed a fairly solid five-member majority of conservative justices (Hall, 1999, p. 394).

So, instead of mentioning any of the pertinent citations listed above, Justice Scalia next mentioned *Hodel* and *FERC* as examples of Court rulings making it "clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs" (p. 925). He also noted that in both *Hodel* and *FERC*, the Court "sustained statutes against constitutional challenge only after assuring ourselves that they did not require the States to enforce federal law" (p. 925; for *FERC*, see pp. 413-422 of this paper; for *Hodel*, see



pp. 421-422 of this paper). Justice Scalia mentioned (without quoting or citing) that the Court, in reaching its decision in *Hodel*,

cited the lower court cases in *EPA v. Brown*, *supra*, but concluded that the Surface Mining Control and Reclamation Act of 1977 did not present the problem they raised because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field... (p. 926)

In his discussion of *FERC*, Scalia lifted a quote out of its full context, which allowed him to attribute a different purpose and meaning to the lifted portion of the quote. First, Scalia's use of the propaganda technique: "We warned that 'this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations,' [456 U.S.,] at 761, 762, 102 S.Ct., at 2138-2139" (p. 926). Now, for the full statement and the preceding sentence to help establish the full context as delivered by Justice Blackmun in the *FERC* decision:

Recent cases, however, demonstrate that this rigid and isolated statement from *Kentucky v. Dennison* [1861] – which suggests that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns – is not representative of the law today. While this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, cf. *EPA v. Brown*, 431 U.S. 99 (1977), there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions. (*FERC v. Mississippi*, 456 U.S. 742, 761-762)

Justice Blackmun's next four sentences provided examples of such instances where federal law had the effect of "direct[ing] state decisionmakers to take or refrain from taking certain actions" (*FERC v. Mississippi*, 456 U.S. 742, 762). The first two succeeding sentences:

In *Fry v. United States*, 421 U.S. 542 (1975), for example, state executives were held restricted, with respect to state employees, to the wage and salary limitations established by the Economic Stabilization Act of 1970. *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979), acknowledged a federal court's power to enforce a treaty by compelling a state agency to "prepare" certain rules "even if state law withholds from [it] the power to do so." *Id.*, at 695. (*FERC v. Mississippi*, 456 U.S. 742, 762)

Thus far, neither the statements nor the full context appeared to constitute the warning desired by Scalia. Nor, as we shall see, did the following two sentences.

And certainly *Testa v. Katt* [330 U.S. 386 (1947)], by declaring that “the policy of the federal Act is the prevailing policy in every state,” 330 U.S., at 393, reveals that the Federal Government has some power to enlist a branch of state government – there the judiciary – to further federal ends. In doing so, *Testa* clearly cut back on both the quoted language and the analysis of the *Dennison* case of the preceding century. (*FERC v. Mississippi*, 456 U.S. 742, 762-763)

The only way that Scalia could mischaracterize the quote he lifted from the *FERC* decision was to utilize a propaganda technique, in this case, the Quoting Out of Context technique, which allowed him to distort and mislead.

Finally, Justice Scalia came to *New York v. United States*, which he somewhat misleadingly highlighted (which is perhaps the reason why the previously mentioned citations were omitted from Scalia’s opinion). According to Scalia:

When we were at last confronted squarely with a federal statute that unambiguously required the States to enact or administer a federal regulatory program, our decision should have come as no surprise. At issue in *New York v. United States* ... (p. 926)

Justice Scalia’s statement implying the primacy of *New York v. United States* ignored *EPA v. Brown*, a case confronting the federal court system with the same identical issue, “requir[ing] the States to enact or administer a federal regulatory program” (p. 926). While the issue was rendered moot before the Supreme Court, three separate Circuit Courts of Appeal had issued rulings, which in all probability, would not have differed from a Supreme Court ruling had the issue remained justiciable. It should not be forgotten that Scalia was a majority member of the split decision in *New York*, a case marked by an absence of solid legal analysis and reasoning combined with a plethora of propaganda techniques utilized in place of such reasoning and

analysis (see pp. 439-470 of this paper). Justice Scalia quoted the holding in *New York*: “The Federal Government,” we held, “may not compel the States to enact or administer a federal regulatory program” (p. 926).

Justice Scalia lifted another quote out of context, the same quote from *Texas v. White* that caused disbelief by Justice Brennan when used by Justice Rehnquist in *National League of Cities v. Usery*, an opinion subsequently overruled by *Garcia* (See the following previous discussions: the previous chapter’s Guarantee Clause case law for the Court’s original decision in *Texas v. White*; this chapter’s discussion of *National League of Cities v. Usery* for Rehnquist’s use of the *Texas* dicta and for Brennan’s criticism of Rehnquist’s use of the *Texas* dicta,). The quote was used subsequently by Justice O’Connor in *New York* and then twice by Scalia in the current case (For O’Connor’s use, see previous discussion of *New York v. United States*; see also 505 U.S. 142, 162). Since a cohort of justices with similar conservative outlooks (who seldom opposed each other but rather formed an ideological team – Rehnquist, O’Connor, & Scalia) have misused the same quote with the same propaganda technique in three Court cases (1977, 1991, & 1997), it is perhaps appropriate to examine the situation in greater detail. When first used by Rehnquist, it was done in the context of his discussion of the “essential role of the States in [the] federal system of government” during the course of an opinion seeking to find a state sovereignty limitation on an expressly delegated power to the federal government by the Constitution (*National League of Cities v. Usery*, 426 U.S. 833, 844). According to Justice Rehnquist: “In *Texas v. White*, 7 Wall. 700, 725 (1869), [Chief Justice Chase] declared that ‘[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States’” (426 U.S. 833, 844). However, what Justice Rehnquist neglected to mention was that *Texas v. White* was not seeking to limit the authority of the federal government

through any state rights limitation; instead it was justifying the Federal Government's use of the Guarantee Clause to reinstate a republican form of government in Texas following the conclusion of the Civil War in the aftermath of Texas' illegal attempt to secede from the Union.

The immediate context of Chief Justice Chase's statement was an attempt to answer two closely related questions: "Did Texas, in consequence of these acts [seceding from the Union and joining the Confederacy], cease to be a State? Or, if not, did the State cease to be a member of the Union" (7 Wall. [74 U.S.] 700, 724)? After reviewing the growth of the "Union of the States" as it moved from "Colonies" to the "perpetual" Union under the Articles of Confederation to the "more perfect Union" under the Constitution, Chief Justice Chase asked a rhetorical question, "What can be indissoluble if a perpetual Union, made more perfect, is not" (7 Wall., at 724, 725)? After further examining the issue, Chase provided the answer to the initial two questions: "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States" (7 Wall., at 725). Since Texas had never ceased to be a state (even though it had rebelled against the Union, had refused to "recognize [its] constitutional obligations," had "assumed the character of enemies," and had "incurred the consequences of rebellion"), it could pursue a law suit against the defendant White (7 Wall., at 727, 732). The foregoing was the actual context in which the statement was originally made. Chief Justice Chase, in making the statement, was not searching for a limitation upon the power of the federal government. Instead the case revolved around the issues of the nature of the Union and the federal government's ability to crush rebellion by the states and to restore them to republican forms of government, which had been destroyed by illegal actions. To use this quote in an argument seeking a state rights limitation upon the federal government, particularly to limit a delegated power, was to impart an interpretation counter to its original use. Such a misuse could

only occur through utilizing the propaganda technique of Quoting Out of Context. Three Supreme Court justices utilized the same propaganda technique with the same quotation to achieve the same purpose, all done through their status as authors of majority opinions – Justice Rehnquist in *National League of Cities v. Usery* (426 U.S. 833, 844), Justice O’Connor in *New York v. United States* (505 U.S. 144, 162), and Justice Scalia, twice in the same opinion (*Printz v. United States*, 521 U.S. 898, 919, 928).<sup>65</sup>

Justice Scalia followed his use of the Quoting Out of Context propaganda technique with another propaganda technique, a False Analogy. In fact, the Out of Context technique was used to set up the false analogy. First, Scalia stated: “It is an *essential attribute of the States*’ retained sovereignty that they *remain independent and autonomous* within their proper sphere of authority (Emphasis added). See *Texas v. White*, 7 Wall., at 725” (p. 928). Then came the false analogy, the falseness deriving from an implied equality of sovereign powers between the states and the federal government, a concept derived from the discredited theory of the Constitution as a “compact between the states” (See the following previous discussions of this paper: “The Kentucky & Virginia Resolutions and Their Subsequent Influence,” historical background of the Tenth Amendment, for Hamilton’s opinion and for discussion of the discredited notion in the context of the Kentucky & Virginia Resolutions; this chapter’s discussion of *McCullough v. Maryland* for Pinkney’s arguments against and also for the Court’s opinion in *McCullough*). According to Scalia:

It is no more compatible with this independence and autonomy that their officers be “dragooned” ... into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws. (p. 928)

Scalia then proceeded to repeat the use of Quoting Out of Context propaganda technique with precisely the same quote from *FERC* as used previously (see previous discussion of this *FERC*

quote). Given Justice Scalia's proclivity for using the Quoting Out of Context technique to distort and change meaning, it is somewhat ironic to note his protestation of the same technique allegedly being employed by Justice Stevens in his dissenting opinion (See subsequent discussion of Justice Stevens' dissent). Scalia protested:

The dissent's suggestion, *post*, at 2398-2399, n. 27, that *New York v. United States*, ... itself embraced the distinction between congressional control of States (impermissible) and congressional control of state officers (permissible) is based upon the most egregious wrenching of statements out of context. (p. 931, n. 16)

One is reminded of the line from Shakespeare's *Hamlet*, "The lady doth protest too much, methinks" (Act III, Scene 2, Line 239).<sup>66</sup>

In order to reach his conclusion without conducting a "balancing" analysis," Justice Scalia resorted to another propaganda technique that was, at best, Hyperbole, at worst, an Unwarranted Conclusion (p. 932). Scalia characterized the Brady Act as "direct[ing] the functioning of the state executive" (p. 932). What the Brady Act did do, according to Scalia's own description of the Act, was require that the gun dealer "provide the 'chief law enforcement officer' (CLEO) of the transferee's residence with notice of the contents (and a copy) of the Brady Form, §§ 922(s)(1)(A)(i)(II)" (p. 903). The CLEO cited by both Scalia and the Brady Act could be either a county sheriff in a rural area, or the chief of police in either a small town or city. The CLEO of a potential gun buyer's residence is most definitely neither the governor nor the attorney general for any state. The Brady Act mentioned neither of these top state executives. While both county sheriffs and chiefs of police administer state laws, their immediate supervisors are not the state attorney general or the governor. Local law enforcement officers are as subject to state legislative direction as to anything else, a fact ignored by Scalia's propaganda technique. As the states are to the federal government in federalism, so the counties

and municipalities are to the state in which they are located. Counties and municipalities are political subdivisions of the states, not the “state executive” as Scalia would have us believe (p. 932). Justice Scalia’s original objection to the Brady Act was that it by-passed the executive machinery of the federal government and transferred “this responsibility to thousands of CLEOs in the 50 states, who are left to implement the program without meaningful Presidential control” (p. 923). In his own words, the act is aimed at CLEOs, not the state executive; hence, the use of a propaganda technique to generate his desired purpose. It is not clear why Justice Scalia didn’t simply refer to the fact that Congress was directing local law enforcement officers in violation of federalism principles. Conceivably the use of a “balancing” test could reach the same conclusion desired by Justice Scalia, or it could be that a balancing test could be refused through solid legal reasoning, but to refuse its use through a propaganda technique does not promote respect for the Court’s reasoning nor its subsequent opinions. Scalia’s propaganda technique provided the penultimate step to his destination:

But where, as her, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a “balancing” analysis is inappropriate. It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect. (Emphasis in original) (p. 932)

As can be seen in the preceding quotation, Justice Scalia also misstated the object of the law, which contradicted his opening statements of the opinion. The major purpose of the Brady Act, in Scalia’s words “the whole *object* of the law,” was, as he described it, to prohibit “firearms dealers from transferring handguns to any person under 21, not resident in the dealer’s State, or prohibited by state or local law from purchasing or possessing firearms, § 922(b)” (pp. 932, 902). Justice Scalia described the involvement of CLEO’s as part of the “interim provisions” of the Brady Act put into place “until that system (the “national instant background-

check system”) [became] operative” (p. 902). However, near the end of his opinion, the major purpose of the Brady Act now becomes an effort “to direct the functioning of the state executive” (p. 932). His earlier characterization of the Act’s purpose was substantiated by reference to specific sections of the Brady Act. His later statement contains no such reference, nor could it.

A lengthy quotation from *New York v. United States* immediately followed Justice Scalia’s use of two propaganda techniques, which, in turn, was immediately followed by a preliminary announcement of how the Court would rule:

[We] conclude categorically, as we concluded categorically in *New York*: “The Federal Government may not compel the States to enact or administer a federal regulatory program.” *Id.*, at 188, 112 S.Ct., at 2435. The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule. (p. 933)

The official holding of the Court’s narrow majority was announced four paragraphs later by Justice Scalia:

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State’s officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. (p. 935)

Perhaps realizing his dismissal of the “balancing” test was a bit shady, Justice Scalia mentioned it again in the penultimate sentence of the paragraph announcing the holding. Not really necessary to the holding, the quotation below immediately followed the above-listed citation.

It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed. (p. 935)



Justice Stevens' dissent offered a direct counterpoint to Scalia's opinion. Justices Souter, Ginsburg, and Breyer joined the major dissenting opinion. Justice Stevens began by reminding the Court that the Brady Act involved the congressional use of a power delegated to it by the Constitution:

When Congress exercises the powers delegated to it by the Constitution, it may impose affirmative obligations on executive and judicial officers of state and local governments as well as ordinary citizens. This conclusion is firmly supported by the text of the Constitution, the early history of the Nation, decisions of this Court, and a correct understanding of the basic structure of the Federal Government. (p. 939)

Justice Stevens and his fellow dissenting justices framed the legal question differently than did the five-member majority. For Scalia, the question had centrally focused on federal commandeering of "state and local law enforcement officers" (p. 902). For Justice Stevens and the four-member minority, the central focus was congressional use of a delegated power to solve a national problem. According to Justice Stevens, "The question is whether Congress, acting on behalf of the people of the entire Nation, may require local law enforcement officers to perform certain duties during the interim needed for the development of a federal gun control program" (p. 939). Citing facts and figures from the congressional investigation of gun violence in the United States, Justice Stevens observed, "The Brady Act was passed in response to what Congress described as an 'epidemic of gun violence'" (p. 940). Noting the intertwined issues of "power" and "national emergency," Justice Stevens listed examples of national problems that "may require a national response before federal personnel can be made available to respond" (p. 940). Based on this reasoning, Justice Stevens posed an additional legal question:

If the Constitution empowers Congress and the President to make an appropriate response, is there anything in the Tenth Amendment, "in historical understanding and practice, in the structure of the Constitution, [or] in the jurisprudence of this Court," *ante*, at 2370, that forbids the enlistment of state officers to make that response effective? (p. 940)

Justice Stevens framed his succeeding question in a manner that: 1) characterized the majority opinion as being questionably based on a not-written rule in the Constitution; and 2) implied the majority-opinion had overstepped its constitutional bounds.

More narrowly, what basis is there in any of those sources for concluding that it is the Members of this Court, rather than the elected representatives of the people, who should determine whether the Constitution contains the unwritten rule that the Court announces today? (p. 940)

In fashion similar to that of a schoolmaster expounding basic principles to uneducated students, Justice Stevens began to answer the questions he had posed. Stevens first noted that Article I, § 8 of the Constitution granted “Congress the power to regulate commerce among the States” (p. 941). Justice Stevens next pointed out the obvious nexus between the Commerce Power and the Brady Act’s “regulation of commerce in handguns” (p. 941). For added measure, Stevens explained the obvious connections between the Necessary & Proper Clause, a constitutionally delegated power, and the Brady Act:

Moreover, the additional grant of authority in that section of the Constitution “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers” is surely adequate to support the temporary enlistment of local police officers in the process of identifying persons who should not be entrusted with the possession of handguns. (p. 941)

Pointing out the obvious conclusion to this stage of the judicial lesson, Justice Stevens declared, “In short, the affirmative delegation of power in Article I provides ample authority for the congressional enactment” (p. 941).

Having completed the first portion of his lesson, Justice Stevens next turned to an explanation of the basic principles of the Tenth Amendment. Stevens first pointed out a fundamental difference between the Tenth Amendment and other constitutional restrictions on government power.

Unlike the First Amendment, which prohibits the enactment of a category of laws that would otherwise be authorized by Article I, the Tenth Amendment imposes no restriction on the exercise of delegated powers. Using language that plainly refers only to powers that are “*not*” delegated to Congress, it provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const., Amdt. 10. (Emphasis in original) (pp. 941-942)

As if to students whose powers of reasoning were limited, Justice Stevens explicitly spelled out the implications of this critical difference:

The Amendment confirms the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit the scope or the effectiveness of the exercise of powers that are delegated to Congress. (p. 942)

After quoting from previous Court opinions ranging from 1876 to 1912 upholding the “paramount sovereignty” of the federal law over state laws “in the exertion of the power confided to it by the Constitution,” Justice Stevens summarized the unequivocal end result:

There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I. (p. 944)

Justice Stevens next addressed the historical development of federalism. Stevens first noted that under the Articles of Confederation the federal government could only issue commands to the states, but not individuals, a “method of governing [that] proved to be unacceptable, not because it demeaned the sovereign character of the several States, but rather because it was cumbersome and inefficient” (p. 945). Justice Stevens then connected that development to the case at hand:

The basic change in the character of the government that the Framers conceived was designed to enhance the power of the national government, not to provide some new, unmentioned immunity for state officers. Because indirect control over individual citizens (“the only proper objects of

government”) was ineffective under the Articles of Confederation, Alexander Hamilton explained that “we must *extend* the authority of the Union to the persons of the citizens.” *The Federalist* No. 15, at 101 (Emphasis added). (p. 945)

Stevens then drew a conclusion directly opposite of Scalia’s opinion (See previous discussion, pp. 495-500):

Indeed, the historical materials strongly suggest that the founders intended to enhance the capacity of the Federal Government by empowering it – as a part of the new authority to make demands directly on individual citizens – to act through local officials. (p. 945)

Based on a re-reading of the remarks by both Hamilton and Madison, as well as the discussion by Justice Stevens, one must question Scalia’s dismissal of such an interpretation by his interjection of an extraneous factor not involved in the original discussions of *The Federalist*, that factor being “the consent of the States” (p. 911; see also previous discussion, pp. 511-516). Justice Stevens buttressed his interpretation by drawing upon further comments by Hamilton made in a different portion of *The Federalist*:

Hamilton made clear that the new Constitution, “by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each in the execution of its laws.” *The Federalist* No. 27, at 180. Hamilton’s meaning was unambiguous; the Federal Government was to have the power to demand that local officials implement national policy programs. (pp. 945-946)

As Justice Stevens explained further with specific source citations, “More specifically, during the debates concerning the ratification of the Constitution, it was assumed that state agents would act as tax collectors for the Federal Government” (p. 946). According to the historical record, both Federalists and Antifederalists “recognized the likelihood that the Federal Government would rely on state officials to collect its taxes” (p. 947, n. 6). Based upon the preceding evidence, Justice Stevens then questioned the validity of the Court’s opinion:

The wide acceptance of this point by all participants in the framing casts serious doubt on the majority's efforts, see *ante*, at 2375, n. 9, to suggest that the view that state officials could be called upon to implement federal programs was somehow an unusual or peculiar position. (p. 947, n. 6)

Justice Stevens further declared:

The Court's response to this powerful historical evidence is weak. The majority suggests that "none of these statements necessarily implies ... Congress could impose these responsibilities without the consent of the States." *Ante*, at 2372 (Emphasis deleted). No fair reading of these materials can justify such an interpretation. (p. 947)

Stevens next turned to Scalia's declaration that "the utter lack of statutes imposing obligations on the States' executive .. suggests an assumed *absence* of such power" (Emphasis in original) (pp. 907-908). Justice Stevens pointed to this statement as being critical for justifying the Court majority's opinion while simultaneously highlighting the actual lack of support provided by *The Federalist* for the Court's position when he observed:

Bereft of support in the history of the founding, the Court rests its conclusion on the claim that there is little evidence the National Government actually exercised such a power in the early years of the Republic. See *ante*, at 2371. This reasoning is misguided in principle and in fact. (pp. 948-949)

Justice Stevens continued:

[W]e have never suggested that the failure of the early Congresses to address the scope of federal power in a particular area or to exercise a particular authority was an argument against its existence. That position, if correct, would undermine most of our post-New Deal Commerce Clause jurisprudence. As Justice O'Connor quite properly noted in *New York*, "[t]he Federal Government undertakes activities today that would have been unimaginable to the Framers." 505 U.S., at 157, 112 S.Ct., at 2418. (p. 949)

Justice Stevens objected to Justice Scalia's description of the early statutes in which Congress relied "on state judges and the clerks of state courts to perform a variety of executive functions" as being merely "related to matters appropriate for the judicial power" under the Supremacy Clause (pp. 949, 908). In Justice Stevens' opinion, "The majority's description of

these early statutes is both incomplete and at times misleading” (p. 949). Citing legislation enacted by the First Congress “requiring state courts to serve, functionally, like contemporary regulatory agencies in certifying the seaworthiness of vessels, Stevens stated, “The majority casts this as an adjudicative duty, *ante*, at 2371, but that characterization is misleading” (p. 951).

Justice Stevens spelled out what was actually required:

The law provided that upon a complaint raised by a ship’s crew members, the state courts were (if no federal court was proximately located) to appoint an investigative committee of three persons “most skilful in maritime affairs” to report back. On this basis, the judge was to determine whether the ship was fit for its intended voyage. (p. 951)

According to Justice Stevens’ characterization of the act, “The statute sets forth, in essence, procedures for an expert inquisitorial proceeding, supervised by a judge but otherwise more characteristic of executive activity” (p. 951). Nor was this the only act “wrongly mischaracterized as involving essentially judicial matters” by Justice Scalia (p. 951, n. 10).

Justice Stevens explained:

For example, the Fifth Congress enacted legislation requiring state courts to serve as repositories for reporting what amounted to administrative claims against the United States Government, under a statute providing compensation in land to Canadian refugees who had supported the United States during the Revolutionary War. (p. 951, n. 10)

He continued:

Contrary to the majority’s suggestion, that statute did not amount to a requirement that state courts adjudicate claims, see *ante*, at 2371, n. 2; final decisions as to the appropriate compensation were made by federal authorities, see Act of Apr. 7, 1798, ch. 26, § 3, 1 Stat. 548. (p. 951, n. 10)

Without specifying the propaganda technique, Justice Stevens accused Justice Scalia of using either the Lie By Omission or the Suppressed Evidence propaganda technique. Not only was the accusation made, but supporting evidence was provided by Justice Stevens. Furthermore, the wrong test was being applied to the situation. Instead of a literal placement test, e.g., to which

branch of government did the official belong, Justice Stevens advocated a functional test, e.g., what was the nature of the duties being performed. In Stevens' view, "We are far truer to the historical record by applying a functional approach in assessing the role played by these early state officials" (p. 951). Justice Stevens elaborated:

The use of state judges and their clerks to perform executive functions was, in historical context, hardly unusual. As one scholar has noted, "two centuries ago, state and local judges and associated judicial personnel performed many of the functions today performed by executive officers, including such varied tasks as laying city streets and ensuring the seaworthiness of vessels." Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 *Colum.L.Rev.* 1001, 1045, n. 176 (1995). (pp. 951-952)

Besides ignoring the historical context, Scalia's insistence on the literal placement test constituted faulty reasoning. Justice Stevens first leveled the charge and then explained.

The majority's insistence that this evidence of federal enlistment of state officials to serve executive functions is irrelevant simply because the assistance of "judges" [i.e., the literal placement test] was at issue rests on empty formalistic reasoning of the highest order. (p. 952)

By means of an extensive footnote, Justice Stevens provided the substance underlying his accusation.

Able to muster little response other than the bald claim that this argument strikes the majority as "doubtful," *ante*, at 2371, n. 2, the Court proceeds to attack the basic point that the statutes discussed above called state judges to serve what were substantially executive functions. The argument has little force. The majority's view that none of the statutes referred to in the text required judges to perform anything other than "quintessentially adjudicative tasks," *ibid.*, is quite wrong. (p. 952, n. 11)

Note that Justice Stevens just accused Justice Scalia of using the False Premise propaganda technique, a technique that provided a critical underpinning of the majority's decision. The conclusion resulting from the untrue premise would be that the statutes provided no historical illustration supporting federal use of state executive functions, thus supporting the sheriffs'

charges and the Court's ruling. Justice Stevens continued his explanation and pointed to an example of the Court's reasoning which undermined its ruling:

The evaluation of applications for citizenship and the acceptance of Revolutionary War claims, for example, both discussed above, are hard to characterize as the sort of adversarial proceedings to which common-law courts are accustomed. As for the majority's suggestion that the substantial administrative requirements imposed on state-court clerks under the naturalization statutes are merely "ancillary" and therefore irrelevant, this conclusion is in considerable tension with the Court's holding that the minor burden imposed by the Brady Act violates the Constitution. (p. 952, n. 11)

Justice Stevens concluded by drawing attention again to the difference between the executive functions required of court officials by the acts and the essential nature of judicial activities involving legal disputes being argued at the bar of justice:

Finally, the majority's suggestion that the early statute requiring state courts to assess the seaworthiness of vessels is essentially adjudicative in nature is not compelling. Activities of this sort, although they may bear some resemblance to traditional common-law adjudication, *are far afield from the classical model of adversarial litigation*. (Emphasis added) (p. 952, n. 11)

Justice Stevens next noted another omission by Justice Scalia, the failure of his "evaluation of the historical evidence ... to acknowledge the important difference between policy decisions that may have been influenced by respect for state sovereignty concerns, and decisions that are compelled by the Constitution" (pp. 952-953). Justice Stevens further elaborated on the difference between a policy preference and a constitutional requirement:

Indeed, an entirely appropriate concern for the prerogatives of state government readily explains Congress' sparing use of this otherwise "highly attractive," *ante*, at 2370, 2371, power. Congress' discretion, contrary to the majority's suggestion, indicates not that the power does not exist, but rather that the interests of the States are more than sufficiently protected by their participation in the National Government. See *infra*, at 2394-2395. (p. 953, n. 12)

Before turning to the structural argument used by the Court majority, Justice Stevens highlighted the lack of both textual and historical support for the majority's position through the following



descriptions: “judicial inferences drawn from a silent text,” “a historical record that surely favors the congressional understanding,” and “judge-made rules of constitutional law” (p. 954; p. 953, n. 14). He summarized the majority opinion’s position as it thus far stood:

Indeed, the majority’s opinion consists almost entirely of arguments *against* the substantial evidence weighing in opposition to its view; the Court’s ruling is strikingly lacking in affirmative support. Absent even a modicum of textual foundation for its judicially crafted constitutional rule, there should be a presumption that if the Framers had actually intended such a rule, at least one of them would have mentioned it. (p. 954)

Justice Stevens elaborated on the last point in the preceding citation:

Indeed, despite the exhaustive character of the Court’s response to this dissent, it has failed to find even an iota of evidence that any of the Framers of the Constitution or any Member of Congress who supported or opposed the statutes discussed in the text ever expressed doubt as to the power of Congress to impose federal responsibilities on local judges or police officers. (p. 954, n. 15)

Continuing his elaboration, Justice Stevens noted the majority’s failure to abide by rudimentary legal rules governing evidence and argumentation:

Even plausible rebuttals of evidence consistently pointing in the other direction are no substitute for affirmative evidence. In short, a neutral historian would have to conclude that the Court’s discussion of history does not even begin to establish a *prima facie* case. (p. 954, n. 15.)

Justice Stevens began his examination of the issues and questions surrounding federalism by noting that the “‘structural’ arguments” used by the Court were “not sufficient to rebut that presumption” [the presumption being “that if the Framers had actually intended such a rule, at least one of them would have mentioned it” (p. 954)] (p. 955). Stevens accused the Court majority of raising a description of federalism to prominence that was unrelated to the real question at hand:

The fact that the Framers intended to preserve the sovereignty of the several States simply does not speak to the question whether individual state employees may be required to perform federal obligations, such as

registering young adults for the draft, ... creating state emergency response commissions designed to manage the release of hazardous substances, ... collecting and reporting data on underground storage tanks that may pose an environmental hazard, ... and reporting traffic fatalities ... and missing children ... to a federal agency. (p. 955)

In effect Justice Stevens accused the majority of using the Red Herring propaganda technique, the red herring being preservation of state sovereignty that drew attention away from the critical issue identified by Justice Stevens (and supported by numerous examples of unchallenged federal legislation through which state employees performed a variety of federal services).

At the same time, Stevens highlighted the difference in the current case (as well as the acts just cited from p. 955) between state employees and employees of local governments, i.e., counties and municipalities. Justice Stevens noted: 1) the preceding pieces of federal legislation did “not involve the enlistment of *state* officials at all, but only an effort to have federal policy implemented by officials of *local* government;” 2) “[b]oth Sheriffs Printz and Mack are county officials;” and 3) “the Brady Act places its interim obligations on chief law enforcement officers (CLEO’s), who are defined as ‘the chief of police, the sheriff, or an equivalent officer,’ 18 U.S.C. § 922(s)(8)” (Emphasis J. Stevens) (p. 955, n. 16). These facts combined to make the “majority’s argument ... particularly peculiar,” the peculiarity deriving from the fact of the majority’s overwhelming dependence upon “state” employees in its argumentation (p. 955, n. 16). Justice Stevens concluded, “[I]t seems likely that most cases would similarly involve local government officials” (p. 955, n. 16).

Continuing his discussion of differences between state and local government officials within the context of federalism, Stevens further observed, “This Court has not had cause in its recent federalism jurisprudence to address the constitutional implications of enlisting nonstate officials for federal purposes” (p. 955, n. 16). And then Justice Stevens dropped a judicial

bombshell by noting that the majority's reasoning and ensuing decision conflicted with the Court decisions involving the Eleventh Amendment.

It is therefore worth noting that the majority's decision is in considerable tension with our Eleventh Amendment sovereign immunity cases. Those decisions were designed to "accor[d] the States the respect owed them as members of the federation." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146... (p. 955, n. 16)

Justice Stevens continued by spelling out the difference between state and local governments that had been carved out by Eleventh Amendment case law.

But despite the fact that "political subdivisions exist solely at the whim and behest of their State," *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 313 ... (1990) (Brennan, J., concurring in part and concurring in judgment), we have "consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 ... (1979); see also *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 47 ... (1994). (p. 955, n. 16)

Posing the hypothetical (in Justice Stevens' analysis) proposition that "[e]ven if the protections that the majority describes as rooted in the Tenth Amendment ought to benefit state officials,"

Justice Stevens logically concluded that it was "difficult to reconcile the decision to extend these principles to local officials with our refusal to do so in the Eleventh Amendment context" (p. 955, n. 16).

Stevens pointed to the *Garcia* decision as illuminating federalism, a decision in which the Court stated:

[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. (p. 956)

Noting that "the Members of Congress are elected by the people of the several States," Justice

Stevens concluded:

[I]t is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents. It is far more reasonable to presume that their decisions to impose modest burdens on state officials from time to time reflect a considered judgment that the people in each of the States will benefit therefrom. (p. 956)

Stevens then connected the federalism described in *Garcia* with both constitutional text and history:

The majority points to nothing suggesting that the political safeguards of federalism identified in *Garcia* need to be supplemented by a rule, grounded in neither constitutional history nor text, flatly prohibiting the National Government from enlisting state and local officials in the implementation of federal law. (p. 957)

He concluded, “[U]nelected judges are better off leaving the protection of federalism to the political process in all but the most extraordinary circumstances” (p. 959).

Justice Stevens next turned to address the negative impact of the Court’s ruling upon both the health of state governments and cooperative federalism. In his opinion, the majority opinion, somewhat ironically, actually damaged “the safeguards against tyranny provided by the existence of vital state governments” (p. 959). Stevens explained:

By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of State’s rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies. (p. 959)

Not only did the majority opinion threaten federalism, it also conflicted with the Federalists and their assurances to Antifederalist opponents that the new government wouldn’t create a huge federal bureaucracy. According to Justice Stevens:

This is exactly the sort of thing that the early Federalists promised would not occur, in part as a result of the National Government’s ability to rely on the magistracy of the States. See, *e.g.*, The Federalist No. 36, at 234-235 (A. Hamilton); *id.*, No. 45, at 318 (J. Madison). (p. 959)

Stevens accused Justice Scalia of using hyperbole when he suggested “that the unity in the Executive Branch of the Federal Government ‘would be shattered, and the power of the President would be subject to reduction, if Congress could ... requir[e] state officers to execute its laws’” (pp. 959-960). What Justice Stevens’ discussion revealed was Justice Scalia’s sophisticated use of the Unwarranted Extrapolation propaganda technique, sophisticated because it also contained an Appeal to Fear technique as well. Stevens noted “the obvious tension between the majority’s claim that impressing state police officers will unduly tip the balance of power in favor of the federal sovereign and this suggestion that it will emasculate the Presidency” (p. 960). It is arguable whether or not the first claim (tipping “the balance of power in favor” of the executive branch) represented use of the Unsupported Claim propaganda technique. The image of the Presidency being emasculated combined hyperbole and an appeal to fear in the form of unwarranted extrapolation. This, however, was not the major point for Justice Stevens. The major problem with this portion of the majority’s opinion lay in the fact that “the Court’s reasoning contradict[ed] *New York v. United States*” (p. 960). Stevens explained:

That decision squarely approved of cooperative federalism programs, designed at the national level but implemented principally by state governments. *New York* disapproved of a particular *method* of putting such programs into place, not the *existence* of federal programs implemented locally. (Emphasis in original) (p. 960)

Justice Stevens next drew attention to the approved ways “by which Congress may urge a State to adopt a legislative program consistent with federal interests” (p. 960).

Indeed, nothing in the majority’s holding calls into question the three mechanisms for constructing such programs that *New York* expressly approved. Congress may require the States to implement its programs as a condition of federal spending, in order to avoid the threat of unilateral federal action in the area, or as a part of a program that affects States and private parties alike. (p. 960)

The interplay between the majority opinion and Stevens' dissent over this issue became complicated at this point, the complexity arising from Justice Scalia's incorrect citation and his use of another propaganda technique to respond to Justice Stevens' criticism. Justice Scalia first noted that "[t]he dissent is correct, *post*, at 2396, that control by the unitary Federal Executive is also sacrificed when States voluntarily administer federal programs" (p. 923, n. 12). However, Justice Stevens made no such remark on the page in the *Supreme Court Reporter* to which Justice Scalia referred. Nor was the remark made on either the preceding or succeeding page. Continuing the line of thought begun with Scalia's reference to the states' voluntary assumption of federal program requirements, Justice Scalia proceeded to utilize the Unsupported Premise propaganda technique. According to Scalia, "[T]he condition of voluntary state participation significantly reduces the ability of Congress to use this device as a means of reducing the power of the Presidency" (p.923, n. 12). Justice Stevens' response to Justice Scalia's remarks follows:

The majority's suggestion in response to this dissent that Congress' ability to create such programs is limited, *ante*, at 2378, n. 12, is belied by the importance and sweep of the federal statutes that meet this description, some of which we described in *New York*. See 505 U.S., at 167-168, ... (mentioning, *inter alia*, the Clean Water Act, the Occupational Safety and Health Act of 1970, and the Resource Conservation and Recovery Act of 1976). (pp. 960-961)

Justice Stevens continued by declaring, "Nor is there force to the assumption undergirding the Court's entire opinion that if this trivial burden on state sovereignty is permissible, the entire structure of federalism will soon collapse" (p. 961). He explained:

These cases [brought by the sheriffs] do not involve any mandate to state legislatures to enact new rules. When legislative action, or even administrative rulemaking, is at issue, it may be appropriate for Congress either to pre-empt the State's lawmaking power and fashion the federal rule itself, or to respect the State's power to fashion its own rules. But these cases, *unlike any precedent in which the Court has held that Congress exceeded its powers*, merely involve the imposition of modest duties on individual officers. (Emphasis added) (p. 961)

Stevens drew attention to the Constitution, to *The Federalist*, and to the state ratifying conventions by noting, “Neither explicitly nor implicitly did the Framers issue any command that forbids Congress from imposing federal duties on private citizens or on local officials” (p. 961).

He continued by drawing a distinction between policy and constitutional authority:

As a general matter, Congress has followed the sound policy of authorizing federal agencies and federal agents to administer federal programs. That general practice, however, does not negate the existence of power to rely on state officials in occasional situations in which such reliance is in the national interest. (pp. 961-962)

Justice Stevens concluded his analysis of the majority opinion’s impact on the health of state governments and cooperative federalism by quoting Justice Oliver Wendell Holmes: “Rather, the occasional exceptions confirm the wisdom of Justice Holmes’ reminder that ‘the machinery of government would not work if it were not allowed a little play in its joints.’ *Bain Peanut Co. of Tex v. Pinson*, 282 U.S. 499, 501” (p. 962).

Justice Stevens next addressed the Court’s claim “that the ‘prior jurisprudence of this Court’ is the most conclusive support for its position” (p. 962). Although the Court had cited *FERC* and *Hodel*, Stevens observed, “Neither case addressed the issue presented here. *Hodel* simply reserved the question.... The Court’s subsequent opinion in *FERC* did the same” (p. 962, n. 26). The remaining “prior jurisprudence” was *New York v. United States*, which Stevens proceeded to analyze (p. 962). After briefly summarizing the issue presented in *New York*, Justice Stevens noted that the Court had held the first two incentives to be constitutional by “not [being] inconsistent with the Tenth Amendment” (p. 962). Stevens proceeded to discuss the third incentive that the Court had determined to be unconstitutional, the take-title provision of the Low-Level Radioactive Waste Act. Mixing his own summary with quotations from the Court’s *New York* decision, Justice Stevens described the Court’s ruling:

After noting that the “take title provision appears to be unique” because no other federal statute had offered “a state government no option other than that of implementing legislation enacted by Congress,” the Court concluded that the provision was “inconsistent with the federal structure of our Government established by the Constitution.” [505 U.S.,] at 177, 112 S.Ct., at 2429. (p. 963)

So far, a fairly straight-forward account of the holding in *New York*. Justice Stevens next statement, however, removed any linkage between the current case and the holding in *New York*: “Our statements, taken in context, clearly did not decide the question presented here, whether state executive officials – as opposed to state legislators – may in appropriate circumstances be enlisted to implement federal policy” (p. 963). Stevens also noted the reliance upon dictum by the Court majority in the current case. “The majority relies upon dictum in *New York* to the effect that ‘[t]he Federal Government may not compel the States to enact *or administer* a federal regulatory program.’ *Id.*, at 188, ... (Emphasis added)” (p. 963). In ironical fashion, Justice Stevens further commented on the dictum just provided by citing a previous opinion authored by Justice Scalia:

But that language was wholly unnecessary to the decision of the case. It is, of course, beyond dispute that we are not bound by the dicta of our prior opinions. See, e.g., *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 ... (1994) (Scalia, J.) (invoking our customary refusal to be bound by dicta”). (p. 963)

Stevens further described the dictum in question:

To the extent that it has any substance at all, *New York*’s administration language may have referred to the possibility that the State might have been able to take title to and devise an elaborate scheme for the management of the radioactive waste through purely executive policymaking. (pp. 963-964)

Using the preceding, Justice Stevens drew attention to the difference between the Court’s reliance upon *New York* and the requirements of the Brady Act.

But despite the majority’s effort to suggest that similar activities [executive policymaking] are required by the Brady Act, see *ante*, at 2380-2381, it is



hard to characterize the minimal requirement that CLEO's perform background checks as one involving the exercise of substantial policymaking discretion on that essentially legislative scale. (p. 964)

Justice Stevens next made a point that drew the ire of Justice Scalia. First, the point: Stevens observed that the same distinction between requiring state officials to comply with federal law and requiring that states directly regulate an activity was “made in the *New York* opinion itself” (p. 964, n. 27). After quoting sections of the *New York* opinion to substantiate his point, Justice Stevens observed:

The Brady Act contains no command directed to a sovereign State or to a state legislature [like the Low Level Radioactive Waste Act did in *New York*]. It does not require any state entity to promulgate any federal rule. In these cases [brought by Sheriffs Printz and Mack], the federal statute is not even being applied to any state official. (p. 964, n. 27)

Justice Stevens then used a quote from *New York* to: 1) characterize the portion of the Brady Act found to be unconstitutional by the Court majority; 2) form the premise for a conclusion that local law enforcement officials were also governed by the Supremacy Clause of the Constitution; and 3) lay the groundwork for the proposition that the *New York* decision was improperly used by the Court majority as a basis for its holding in the current case:

It [the Brady Act] is a “congressional regulation of individuals,” *New York*, 505 U.S., at 178, 112 S.Ct., at 2430, including gun retailers and local police officers. Those officials, like the judges referred to in the *New York* opinion, are bound by the Supremacy Clause to comply with federal law. Thus, if we accept the distinction identified in the *New York* opinion itself, that decision does not control the disposition of these cases [the cases brought by Sheriffs Printz and Mack]. (p. 964, n. 27)

With a major underpinning of his opinion threatened, Justice Scalia responded by accusing Stevens of using the Quoting Out of Context propaganda technique (See also previous discussion of Justice Scalia's opinion, pp. 502-503):

The dissent's suggestion, *post*, at 2398-2399, n. 27, that *New York v. United States*, 505 U.S., 144, ... itself embraced the distinction between

congressional control of States (impermissible) and congressional control of state officers (permissible) is based upon the most egregious wrenching of statements out of context. (p. 931, n. 16)

However, instead of substantiating his charge, Scalia remarked, “It would take too much to reconstruct the context here, but by examining the entire passage cited, *id.*, at 178-179, the reader will readily perceive the distortion” (p. 931, n. 16). Thus Scalia’s charge became an Unsubstantiated Claim, itself constituting yet another propaganda technique used by Scalia in writing the majority opinion. From this reader’s perspective, the only thing that appears to have been “egregiously wrenched” (See penultimate citation, J. Scalia) was the heretofore unnoticed reliance by the Court majority upon dicta in *New York* and other cases for its opinion as noted by Stevens. Justice Stevens clearly distinguished the differences between the actual holding in *New York* and the dicta pertaining to that case. This distinction, combined with further analysis by Justice Stevens, thereby *wrenched* a major underpinning from the majority opinion’s justification of its holding.

Justice Stevens continued his analysis of the Court’s claim that prior jurisprudence justified its ruling by quoting Justice Kennedy’s distinction between another case and *New York*, which also involved federalism. Stevens introduced the quote with the statement that Kennedy’s “recent comment about another case that was distinguishable from *New York* applies to these [the cases brought by Sheriffs Printz and Mack] as well”:

This is not a case where the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, cf. *New York v. United States*, ... (1992), or to organize its governmental functions in a certain way, cf. *FERC v. Mississippi*... (pp. 964-965)

At this point of his dissent, Justice Stevens responded to a response by Scalia to the difference, pointed out by Stevens, between the *New York* decision and the Brady Act. That difference

centered upon the distinction between individuals and state officials (individuals being subject to federal law, state officials being either subject or not-subject to federal law in their official capacity, the decision depending upon other factors as determined by Tenth Amendment case law), a difference that, in turn, was governed by the Eleventh Amendment case law's distinctions between individuals not entitled to immunity from prosecution and those persons considered to be state officials who were thereby eligible for Eleventh Amendment immunity. As can be seen from the preceding, both the issue and the clash of the two justices were complex. To ease the complexity somewhat, Justice Scalia's response will be presented first, followed by Justice Stevens' response to Scalia, which will then be followed by an analysis of the two positions.

Justice Scalia's response follows:

The Brady Act, the dissent asserts, is different from the "take title" provisions invalidated in *New York* because the former is addressed to individuals – namely, CLEO's – while the latter were directed to the State itself. That is certainly a difference, but it cannot be a constitutionally significant one. (p. 930)

In explaining his thinking, Justice Scalia stated, "While the Brady Act is directed to 'individuals,' it is directed to them in their official capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State" (p. 930). Justice Stevens responded to Scalia's response as follows:

In response to this dissent, the majority asserts that the difference between a federal command addressed to individuals and one addressed to the State itself "cannot be a constitutionally significant one." *Ante*, at 2382. But as I have already noted, n. 16, *supra*, there is abundant authority in our Eleventh Amendment jurisprudence recognizing a constitutional distinction between local government officials, such as the CLEO's who brought this action, and state entities that are entitled to sovereign immunity. (p. 965)

The difference between the two positions hinges on the application of Eleventh Amendment jurisprudence as a factor determining the classification of local government officials as either

individuals or as state officials. Scalia's position on the applicability of the Eleventh Amendment was spelled out in a footnote to his opinion:

Contrary to the dissent's suggestion, *post*, at 2394-2395, n. 16, and 2399, the distinction in our Eleventh Amendment jurisprudence between States and municipalities is of no relevance here. We long ago made clear that the distinction is peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity... (p. 931, n. 15)

Scalia cited two cases to support his contention, a 1978 ruling and *National League of Cities v. Usery*. However, *National League of Cities* was subsequently overruled by *Garcia*, so its supporting value was questionable. To a student of American government, the fact that both the Tenth and Eleventh Amendments focus on state sovereignty would seem to indicate a nexus of some sort between the two. Furthermore, Justice Scalia's own words established a nexus, which belied his statement disavowing Eleventh Amendment applicability. In his discussion of the difference between action directed at officials and that directed towards individuals, Scalia noted:

The distinction between judicial writs and other government action directed against individuals in their personal capacity, on the one hand, and in their official capacity, on the other hand, is an ancient one, principally because it is dictated by common sense. We have observed that "a suit against a state official in his or official capacity is not a suit against the official but rather is a suit against the official's office.... As such, it is no different from a suit against the State itself." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 ... (1989). (pp. 930-931)

In the same sense that the Eleventh Amendment determined whether one was considered an individual or a state official regarding prosecution for official acts, the Eleventh Amendment also determined applicability of Tenth Amendment jurisprudence regarding congressional legislative requirements. Such was Justice Stevens' position, which seemed to be confirmed in part by Justice Scalia in the preceding citation. Eleventh Amendment jurisprudence, at the time of the *Printz* ruling, had established that CLEO's were not entitled to Eleventh Amendment immunity;

hence, they were considered individuals. Such a position, however, fundamentally undermined the Court's ruling in *Printz*. That reality, and not any legal reasoning, determined the majority's position in both Justice Stevens' and this writer's judgment.

Having concluded his discussion of the Court's claim that prior jurisprudence justified its determination of the case at hand, a claim depending upon one critical case, *New York v. United States*, a claim severely damaged by Stevens' analysis showing critical differences between *New York* and the questioned provision of the Brady Act, Justice Stevens proceeded to discuss three cases, which "the majority either misconstrue[d] or ignore[d]," that, according to Stevens, were "more directly on point" (p. 965). Justice Stevens then proceeded to discuss *FERC v. Mississippi*, 546 U.S. 742 (1982), *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), and *Testa v. Katt*, 330 U.S. 386 (1947). The discussion broke no new ground, but did support earlier points made by Justice Stevens in his dissenting opinion. Nearing the conclusion of his dissent, Stevens characterized the challenged portion of the Brady Act through the use of an analogy. Justice Stevens observed:

The provision of the Brady Act that crosses the Court's newly defined constitutional threshold is more comparable to a statute requiring local police officers to report the identity of missing children to the Crime Control Center of the Department of Justice than to an offensive federal command to a sovereign State. (p. 970)

Stevens then concluded:

If Congress believes that such a statute will benefit the people of the Nation, and serve the interests of cooperative federalism better than an enlarged federal bureaucracy, we should respect both its policy judgment and its appraisal of its constitutional power. Accordingly, I respectfully dissent. (p. 970)

Justices Souter and Breyer each offered briefer dissenting opinions, neither of which broke new ground that significantly undercut the majority opinion. Justice Stevens joined Justice

Breyer's dissent, but not that of Justice Souter. Justice Breyer emphasized the question originally posed by Justice Stevens:

Why, or how, would what the majority sees as a constitutional alternative – the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy – better promote either state sovereignty or individual liberty? See *ante*, at 2389, 2396 (Stevens, J., dissenting). (p. 977)

Breyer also re-emphasized points made by Stevens that “the Constitution itself [was] silent on the matter” (a point with which all Justices were in agreement), and that “[p]recedent support[ed] the Government's position” (p. 978). Justice Souter's dissent focused primarily upon his interpretation of *The Federalist*, which, in his opinion, conflicted with the majority opinion.

*Significance for the tenth amendment.*

The true significance of this case for Tenth Amendment case law is most difficult to assess. The difficulty arises from the majority opinion's extensive and varied use of propaganda techniques as well as a heavy reliance upon dicta in place of solid legal reasoning based upon prior case law holdings, constitutional jurisprudence, and accurate portrayals of the historical background. In addition, the decision was one that was narrowly reached. Some time in the future, a Court will acknowledge the absence of solid legal reasoning in this case and will overturn any precedents involved in the *Printz* ruling. A future Court will be appalled by the prevalence of propaganda techniques utilized by the majority opinion to provide the appearance, but not the substance, of logical argument utilizing solid legal reasoning.

Justice Stevens' dissent appeared to be aimed at such a future Court. Stevens utilized no propaganda techniques that this writer could detect. Justice Stevens focused upon the holdings of case law and discussed the legal issues centrally involved. His analysis destroyed the majority opinion's reasoning and proposed legal underpinnings. All Justice Stevens lacked was one more

justice of the Supreme Court unwilling to tolerate such prevalent use of propaganda techniques as was displayed in this opinion. Unlike Justice Scalia, Justice Stevens discussed *The Federalist* without employing propaganda techniques in his argumentation. Unlike Justice Scalia, Justice Stevens did not rely upon dicta to make legal points, but instead discussed points related to actual case holdings. Unlike Scalia, Stevens substantiated his position regarding the interplay of Eleventh Amendment jurisprudence with the legal issues and determinations involved in this case. Unlike Justice Scalia, Justice Stevens differentiated between dicta and the actual holding in discussing the relevance of the *New York* decision for the Brady Act. Finally, unlike Justice Scalia's multiple and varied uses of propaganda techniques, Justice Stevens used no such techniques in his dissenting opinion. A future Court may realize these factors and be amazed at such a state of law.

In the short term, *Printz* will serve notice that the Tenth Amendment can be construed as a limitation upon a constitutionally delegated power if it infringes state sovereignty in other than the three accepted ways, e.g., conditional spending, provides for continued participation in an otherwise pre-emptible field, and makes the same provisions for private citizens and government officials.

**The tenth amendment as a guarantee of republican government for the states.**

***Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135 (1892).***

*Case summary.*

The issue originated in Nebraska and involved citizenship with a resulting effect upon eligibility to hold state office. Boyd, born in Ireland of parents who immigrated to Ohio when he was ten, was elected governor of Nebraska. Thayer, the previous governor who hadn't run for re-election, sought to invalidate the election results by claiming that Boyd was not a citizen

because first, his immigrant father didn't get citizenship papers until after Boyd turned twenty-one and second, because Boyd did not apply for citizenship after reaching legal age. Because the state attorney general would not prosecute the case, Thayer obtained permission from the Nebraska Supreme Court "to file an information against James E. Boyd to establish the relator's right to the office of governor of that State, and to oust the respondent therefrom" (p. 137).

Boyd responded that his father "in open court declared it to be his *bona fide* intention to become a citizen of the United States" on March 5, 1849, and thereafter exercised full rights of citizenship, including being elected to public office (p. 139). Believing that he was a citizen by virtue of his father's declaration, Boyd asserted that he voted in Ohio before moving to Iowa and then on to the Nebraska Territory as a young man where he had resided continuously since August of 1856. During his Nebraska residency Boyd had been elected county clerk, had served as a U.S. soldier on Nebraska's frontier, had been elected to the territorial legislature, had also been elected to serve in two state constitutional conventions, and had served two terms as Omaha's mayor before being elected governor. Boyd had continuously exercised his right to vote during his tenure in Nebraska. After learning that his citizenship was being questioned, Boyd had gone before the U.S. District Court for the District of Nebraska "for the purpose of removing all doubts that might arise" concerning his citizenship (p. 149). The U.S. District Court "found, determined and adjudged that he was in fact and law a full citizen of the United States" (p. 149).

The Nebraska Supreme Court, with two of three justices concurring while one dissented, ruled that Boyd was not a U.S. citizen as required by the state constitution because his father hadn't received naturalization papers until after Boyd had turned twenty-one. Accordingly the



court issued a “judgment of ouster” against Boyd as well as an order reinstating Thayer to the governor’s office (p. 150). Boyd appealed on a writ of error to the U.S. Supreme Court.

Chief Justice Fuller delivered the Court’s opinion, which overturned the ruling by the Nebraska Supreme Court. Justice Field dissented, relying on the Tenth Amendment and the Guarantee Clause to support his position. Chief Justice Fuller began by citing Justice Waite’s observation in *United States v. Cruikshank*, in which Waite noted, “Citizens are the members of the political community to which they belong” (p. 158). The Court asserted its jurisdiction because a defense had been “interposed under the Constitution or laws of the United States” that “involved the denial of a right or privilege under the Constitution and laws of the United States” and had been overruled by “the highest court of the State” (p. 161).

According to the Court, the critical question involved congressional authority over the Nebraska Territory before Nebraska became a state because Boyd had moved to and resided in the Nebraska Territory. “What the State had power to do after its admission is not the question. Before Congress let go its hold upon the Territory, it was for Congress to say who were members of the political community” (p. 175). This position (viewing the critical issues as arising while Nebraska was still a territory and not a state) allowed the Court to avoid any issues presented under authority of the Tenth Amendment. The Court noted that the “organic law under which the Territory of Nebraska was organized” stipulated that “every free white male inhabitant above the age of twenty-one years who shall be an actual resident of said Territory, and shall possess the qualifications hereinafter prescribed, shall be entitled to vote... and shall be eligible to any office within the said Territory” (pp. 170-171). Also, the act of Congress “to enable the people of Nebraska to form a constitution and state government, and for the admission of such State into the Union on an equal footing with the original states” stipulated that “the inhabitants of ... the

Territory of Nebraska ... are hereby authorized to vote for and choose representatives to form a convention..." (pp. 172-173). Finally, the Court cited another ruling by Chief Justice Waite, this time from *Minor v. Happersett* in which he observed, "Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became *ipso facto* a citizen – a member of the nation created by its adoption" (p. 176). Because new states were admitted to the Union "on an equal footing with the original States, in all respects whatever," including "equality of constitutional right and power" (p. 170), Boyd

was within the intent and meaning, effect and operation of the acts of Congress in relation to citizens of the Territory, and was made a citizen of the United States and of the State of Nebraska under the organic and enabling acts and the act of admission. (p. 179)

The Court ruled that Boyd was a citizen, reversed the decision of the Nebraska Supreme Court, and remanded "the cause" to be "proceeded in according to law and in conformity with this opinion" (p. 182).

*Significance for the tenth amendment.*

The defense had argued that Boyd was not a citizen since he was foreign-born and had never been naturalized, that the admission of Nebraska as a state by Congress had not made him a citizen, and that the constitution and legislation of Nebraska controlled the issue. Specifically, defense attorneys argued:

The distinction made in the constitution and the legislation of that State between citizens and aliens is at war with the suggestion that all the inhabitants of Nebraska were citizens of Nebraska and made *ipso facto* citizens of the United States by the admission of the State into the Union. (p. 156)

By moving the critical issue to a time period before Nebraska achieved statehood, however, the Court defused the Tenth Amendment issue. However, Justice Field rested his dissenting opinion on both Tenth Amendment and Guarantee Clause grounds, arguing that the Tenth Amendment

and the Guarantee Clause prohibited any interference with the ruling of the Nebraska Supreme Court. Such a position implied no significant political differences between a territory and a state, which proved to be a proposition too difficult to defend. Justice Field made several remarks regarding states, state sovereignty, and reserved powers; however, such remarks applied to states as states, not to their prior status as territories. Ironically, the remark made by Justice Field regarding the Guarantee Clause could have been viewed as a reason to ignore Tenth Amendment concerns, had the Tenth Amendment possessed any viability in the case at hand. Regarding the Guarantee Clause, Justice Field stated:

Its [the federal government] power of interference with the administration of the affairs of the State and the officers through whom they are conducted extends only so far as may be necessary to secure to it a republican form of government.... Except as required for these purposes, it can no more interfere with the qualifications, election and installation of the state officers, than a foreign government. And all attempts at interference with them in those requests ... are in my judgment so many invasions upon the reserved rights of the States and assaults upon their constitutional authority.  
(p. 183)

What Field ignored, and what could have been argued, should it have been necessary, was that the Guarantee Clause required intervention by the United States in order to restore the will of the people who had elected Boyd under a republican form of government to be their chosen governor. However, by correctly avoiding the Tenth Amendment issue, the Court rendered it unnecessary to make such an argument.

***Chimento v. Stark, 353 F.Supp. 1211 (1973); 414 U.S. 802 (1973).***

*Case summary.*

This case involved a conflict between the right of a state, under the Tenth Amendment, to determine qualifications for the office of governor, and the right of an individual to pursue the governorship. It was decided by a three-judge panel of the United States District Court for the

District of New Hampshire, whose decision was subsequently affirmed without comment by the United States Supreme Court.

Dating back to its adoption in 1784, the New Hampshire Constitution specified a residency requirement of seven years for all candidates for Governor of that state. Carmen Chimento, the plaintiff in the case, had resided in New Hampshire for three years when he formally announced his candidacy for the office of Governor. Robert Stark, then the Secretary of State for New Hampshire, refused to place his name on the ballot for the primary election because Chimento didn't meet the residency requirement. This action precipitated the initiation of the lawsuit. Chimento sought an injunction to stay the primary election until the question of his candidacy was resolved, but his request was denied. Thereupon, Chimento announced he would run as an independent candidate for Governor of New Hampshire. The Attorney General of New Hampshire directed Stark, as Secretary of State of New Hampshire, "not to accept his filing papers as an independent candidate ... for the general election" (p. 1213). Chimento then sought "a temporary restraining order to enjoin the Secretary of State from not accepting his filing papers" (p. 1213). This, too, was denied.

At the hearing before the U.S. District Court in New Hampshire, Chimento asked the Court "to declare unconstitutional and permanently enjoin the enforcement of Part Second, Article 42, [the residency requirement] of the New Hampshire Constitution" because it violated his rights guaranteed by "the Equal Protection Clause of the Fourteenth Amendment, the First Amendment, [and] the constitutional right of unrestricted interstate travel" (p. 1212). Chimento argued that the residency requirement created a class of citizens, i.e., those citizens not meeting the residency requirement, who were denied the right to run for office and thus denied the equal protection of the law. Because he couldn't run for office, Chimento argued that his "right to

association” and to freely express “his political views” under the First Amendment were also violated (p. 1217). Finally, he argued that “[c]andidate durational residency requirements” penalized “the right to travel” (p. 1218).

The State of New Hampshire argued that the constitutional residency requirement for candidates for Governor represented a “compelling state interest” in “maintaining a responsive and responsible government through the democratic process” (p. 1215). First, according to New Hampshire, the residency requirement

ensure[d] that the chief executive officer of New Hampshire [was] exposed to the State and its people, thereby giving him familiarity with and awareness of the conditions, needs, and problems of both the State of New Hampshire and the various segments of the population within the State, while at the same time giving the voters of the State an opportunity to gain by observation and personal contact some firsthand knowledge of the candidates for Governor... (p. 1215)

Also, the residency requirement acted “to prevent frivolous candidacy by persons who have had little previous exposure to the problems and desires of the people of New Hampshire” (p. 1215).

District Judge Bownes delivered the District Court’s opinion. Circuit Judge Campbell wrote a separate concurring opinion with which Judge Gignoux concurred. After noting the facts of the case, Judge Bownes cited a Supreme Court ruling describing the ability to run for office as a basic constitutional right:

It is well settled that there exists “a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications,” and a state “may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.” *Turner v. Fouche*, 396 U.S. 346, 362-363 ... (1970). (p. 1213)

Bownes observed that the “Supreme Court ha[d] developed two basic tests” to determine whether or not the discrimination was “invidious,” the “traditional ‘reasonable basis’ test versus

the stricter ‘compelling state interest’ test” (p. 1213). Paraphrasing another Supreme Court ruling, Judge Bownes stated the criteria for the stricter test:

In general, if the challenged law directly affects a “fundamental” or “basic” right or draws lines which result in a “suspect classification, [*e.*]g., a classification based on race, religion, national origin, or personal wealth[,] the proponents of the law must make a “clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest.” *Dunn v. Blumstein*, *supra*, 405 U.S. 341... (p. 1213)

Bownes further explained, “Semantics aside, the question is resolved judicially by determining what is more important to our form of government; the rights protected by the state law in question or the rights infringed by it” (p. 1214). After discussing further case law noting the nexus of “the right to run for public office” with other fundamental rights, *e.g.*, the “right to vote,” the “right of individuals to associate for the advancement of political beliefs,” the “right of qualified voters ... to cast their votes effectively,” the District Court ruled that “the ‘compelling interest’ test” was required (p. 1214).

District Court Judge Bownes summarized the case law involving a clash of Tenth Amendment state rights with individual constitutional rights:

A state’s right to impose restrictions on one seeking public office is a power reserved to the states under the Tenth Amendment of the United States Constitution. However, if the state’s exercise of this right invades an individual’s constitutional rights, the restrictions become unconstitutional unless there is a showing of a compelling state interest justifying them. *Shapiro v. Thompson*, 394 U.S. 618 ... (1969); *Kramer v. Union Free School District*, 395 U.S. 621 ... (1969); *Cipriano v. City of Houma*, 395 U.S. 701 ... (1969).

After examining the impact of the residency requirement on both candidates and voters, the District Court concluded “that the seven year residency requirement acts only as a minimal infringement upon the ability of the plaintiff to participate in the election process and that “its limiting effect upon the voters’ choice of candidates [was] more hypothetical than real” (pp.

1215-1216). “Moreover,” the Court observed, “the seven year period does not act as an outright ban on anyone’s candidacy for Governor; rather it delays the eligibility of a candidate to the office of Governor until a time when he has been a resident of the State for seven years” (p. 1216). The Court further noted that: 1) this was the first time in the New Hampshire Constitution’s history that the residency requirement had been challenged; 2) the New Hampshire Constitution was modeled on the Massachusetts Constitution of 1780 that had been “written primarily by John Adams,” one of the nation’s founders;<sup>67</sup> and 3) “[f]orty-three states currently [had] durational residency or citizenship requirements as conditions of eligibility for the office of Governor” (p. 1217). The only states not having durational residency requirements to run for the office of Governor were Connecticut, Kansas, Ohio, Rhode Island, Washington, West Virginia, and Wisconsin.<sup>68</sup> The three-judge District Court concluded that “the residency requirement of the New Hampshire Constitution does promote legitimate state interests” (p. 1217). The opinion continued:

It ensures that the chief executive officer of New Hampshire is exposed to the problems, needs, and desires of the people whom he is to govern, and it also gives the people of New Hampshire a chance to observe him and gain firsthand knowledge about his habits and character. While the length of the residency requirement may approach the constitutional limit, it is not unreasonable in relation to its objective. (p. 1217)

The District Court also rejected Chimento’s contention that the residency requirement “abridge[d] rights guaranteed to him and others similarly situated under the First Amendment” (p. 1217). Judge Bownes explained, “This restriction does not deprive anyone of his right to association or of the freedom of expression of his political views” (p. 1217). Also rejecting Chimento’s last contention that the residency requirement restricted his “constitutional right to travel freely interstate,” the District Court observed: “It cannot be seriously argued that the inability to run for Governor is a real impediment to interstate travel” (p. 1218).

*Significance for the tenth amendment.*

*Chimento v. Stark* established that the right of a state to determine qualifications for the office of Governor is one of the powers reserved to states by the Tenth Amendment. Implicitly, the district court ruling, affirmed by the Supreme Court, also established a basic criterion for the meaning of republican government under the Guarantee Clause of the U.S. Constitution. The *Chimento* ruling also provided a glimpse into how judicial proceedings resolve conflicts between two fundamental rights.

Finally, it should be noted that although the opinion in *Chimento* emanated from a federal district court, it was an opinion affirmed without comment by the U.S. Supreme Court upon appeal by Mr. Chimento. Thus the opinion by the federal District Court of New Hampshire has the status of a Supreme Court decision, a status subsequently confirmed by the Fifth Circuit Court of Appeals in *Woodward v. City of Deerfield Beach* when the Circuit Court opinion noted, “Moreover, in *Chimento v. Stark*, 353 F.Supp. 1211 (D.N.H.), aff’d mem., 414 U.S. 802, 94 S.Ct. 125, 38 L.Ed.2d 39 (1973), the Supreme Court upheld a seven-year durational residence requirement for gubernatorial candidates in New Hampshire” (538 F.2d 1081, 1084 [1976]).

***Henderson v. Fort Worth Independent School District, 526 F.2d 286 (1976).***

*Case summary.*

This case involved a conflict between the right of a state, under the Tenth Amendment, to determine qualifications for school board candidates, and the right of an individual to pursue public service by serving as a member of the school board. The case originated in the U.S. District Court for the Northern District of Texas. District Court Judge Mahon ruled in favor of the State of Texas and denied relief to two candidates denied access to the ballot as well as one voter who supported both potential candidates. They appealed, and the case was argued before



Judges Bell, Thornberry, and Morgan of the Fifth Circuit Court of Appeals who subsequently overruled the district court's decision.

The case centered on a Texas statute that required candidates for school boards in Texas to have been “qualified voters of said district for a period of three years” (p. 287). Thomas Earl Henderson, Jr., and Mr. Puente wished to serve on their community's school board, but were not placed on the ballot by district officials because they did not meet the voter registration requirement. Ms. Boles was a “qualified voter of the Fort Worth Independent School District” who had desired to cast her vote for both Henderson and Puente (p. 288, n. 1). Henderson, Puente, and Boles filed suit in U.S. District Court. District Court Judge Mahon applied the “traditional ‘rational relationship’ formula” to the Texas statute and found that the Texas legislature had a rational basis for the statute by which two classes of school district residents were created, i.e., one class “of all residents who [were] not registered to vote or who [had] been registered to vote for ... less than three years” and another class made up “of all residents who [had] been registered voters for a period of three years or more” (p. 290). The rational basis consisted of the desire of Texas legislators to ensure “that persons seeking a school board position be familiar with the workings of the board and the concerns of the district, and by reason of that familiarity possessed of a modicum of expertise” (p. 289).

Circuit Judge Thornberry delivered the opinion of the three-member U.S. Court of Appeals, Fifth Circuit. Two questions provided the focus for resolving the legal conflict. First, was the dispute moot? Second, did the Texas statute with the “three-year ‘qualified voter’ requirement” pass constitutional muster (p. 288)? Regarding the first question, the Circuit Court ruled that the question was moot for Mr. Puente because he would meet the eligibility requirements at the next school board election. According to Judge Thornberry, “[A]ppellant

Puente's claim falls within the 'capable of repetition, yet evading review' exception to the mootness doctrine" (p. 288, n. 1). Mr. Henderson, however, would still be ineligible under the current statute to run for the school board at the next election. On that basis, the Circuit Court ruled that Henderson's case was "not moot" (p. 288). For Ms. Boles, the question of mootness centered on another issue, whether or not she possessed legal standing "to challenge the statute under which the potential candidate was denied access to the ballot" (p. 287). Finding that she was "a resident and qualified voter of the Fort Worth Independent School District who wishe[d] to cast her vote for appellants Henderson and Puente," the Fifth Circuit Court ruled that she possessed the necessary standing to challenge the statute with regards to "appellant Henderson" (p. 288, n. 1).

In examining the merits of Mr. Henderson's claim under the Equal Protection Clause of the Fourteenth Amendment, the Circuit Court drew attention to the distinction between residency and voter registration requirements. After observing that the Texas statute went beyond residency and age requirements, Judge Thornberry noted:

The importance of this distinction – between residency and registration – is no more amply demonstrated than by the fact that appellant Henderson has been a resident of the Fort Worth School District for thirteen years, but will still be ineligible as a candidate in the 1976 election. (p. 290)

In examining the question of "the appropriate standard of review" for judging "the statutory classification in question," the Fifth Circuit Court ruled that "the district court erred in its choice of the appropriate standard of review" (pp. 290; 291). Instead of using "the traditional 'rational relationship' formula," the district court should have used "the more stringent 'strict scrutiny' standard" (pp. 290; 291). Proceeding with an examination of the "barrier erected" by the challenged Texas statute (p. 291), Judge Thornberry observed:

It is absolute in its operation. No exception is made for expertise, familiarity, or the extent of political support in fact possessed by a potential candidate. Not unlike the exorbitant filing fees in *Bullock v. Carter*, section 7 [the Texas statute] denies access to what must be assumed is a significant number of potential school board candidates, and on that basis the statute's impact on voters is substantial. (pp. 291-292)

After noting that “a majority of courts have employed a standard of strict scrutiny” when they examined “less restrictive, but somewhat analogous durational requirements,” Judge Thornberry again concluded that the Texas statute “must withstand strict scrutiny” (p. 292).

Beginning the Circuit Court's analysis of the constitutional conflict, Thornberry articulated the basic requirement that the challenged statute had to meet. “When subjected to strict scrutiny, a statute or legislative scheme must be shown necessary to promote a compelling state interest. *Shapiro v. Thompson*, [394 U.S. 618 (1969)]; *Bullock v. Carter*, [405 U.S. 134 (1972)]” (p. 292). The Fifth Circuit Court dealt with arguments presented by school district attorneys that *Chimento* controlled the current case, thus Texas could “without violating the Equal Protection Clause ... impose a three year ‘qualified voter’ requirement,” by noting two “important” distinctions between *Chimento* and the “instant case” (p. 292). The first difference was that Chimento could have legally run for a variety of other “public offices below that of governor” and was thus “not completely barred from offering himself for service in state government” (p. 292). Mr. Henderson, however, in wishing to serve on the school board, had “no lesser offices available to satisfy this particular desire to serve the public” (p. 293). The second difference was that the issue in *Chimento* “was residency, not registration” (p. 293). The Fifth Circuit Court opinion pointed again to the importance of this distinction by commenting, “As the situation of appellant Henderson demonstrates, the difference between the former and the latter can be crucial” (p. 293; see also p. 290 of the opinion wherein the difference was spelled out as noted on p. 551 of this paper).

The Circuit Court discussed the constitutional underpinning of the State of Texas' position.

The state is clearly vested with the power, derived from the Tenth Amendment, to prescribe reasonable citizenship, age, and residency requirements on the availability of the ballot ... and the power to prescribe reasonable qualifications extends to candidates for office. (p. 292)

The Fifth Circuit Court also noted the state's justification for its law as being "the state's interest in a ballot composed of knowledgeable and qualified candidates for the increasingly complex job of school board member" (p. 292). "However," the Circuit Court pointed out, "voter registration for a period of three years is, at best, a crude index of the capabilities of a potential candidate" (p. 292). The opinion continued by noting better indices of the state's goal: "The background, experience, and political views of the potential candidate are, among others, the indicia of merit and capability" (p. 292). Instead of mandating those qualifications, however, a better and more democratic method is to allow the electorate to make those determinations through the political process.

[T]he power to make necessarily subjective discriminations on the basis of background, experience, or political philosophy rests with the voters of the Fort Worth School District. It can be assumed that opposing candidates will bring deficiencies in any of these areas to the attention of the voters. (p. 292)

In its decision to reverse the decision of the U.S. District Court for the Northern District of Texas, the Fifth Circuit Court held that the challenged statute, enacted under authority of the Tenth Amendment, didn't meet the strict scrutiny requirements and thus denied Mr. Henderson of a fundamental right guaranteed to him by the Fourteenth Amendment.

We hold that the three year "qualified voter" requirement of section 7 goes beyond the necessary power of the state to prescribe minimal candidate qualifications and denies appellant Henderson rights secured by the Equal Protection Clause of the Fourteenth Amendment. (p. 293)

*Significance for the tenth amendment.*

*Henderson v. Fort Worth School District* highlighted two parallel conflicts of rights, one being explicit with the other being implicit, in the text of the opinion. The first conflict, explicitly described in the Fifth Circuit Court's opinion, involved the state's right to determine candidate qualifications versus an individual citizen's right to run for public office in a constitutionally-based democratic republic. More specifically, the disagreement pitted the Tenth Amendment against the Equal Protection Clause of the Fourteenth Amendment. In this instance, the Circuit Court upheld individual rights guaranteed by the Fourteenth Amendment's Equal Protection Clause, holding that a durational voter registration requirement for candidate eligibility exceeded the state's power "to prescribe minimal candidate qualifications" as it did not meet the required standard of strict scrutiny (p. 293). While the state had authority under the Tenth Amendment to "prescribe reasonable qualifications" for candidates running for public office, the durational voter registration requirement was both unreasonable and addressed in only a "crude" fashion the "capabilities of a potential candidate" (p. 292). The facts in the case also distinguished *Henderson* from *Chimento*.

The second conflict, implicit in the text of the Circuit Court's opinion, involved the right of the state to "make necessarily subjective discriminations" of the various candidates' abilities versus the rights of the "voters of the Fort Worth School District" to determine which candidate is best qualified to fulfill the duties of elected office (p. 292). The Circuit Court stated that the state has the power "to prescribe reasonable citizenship, age, and residency requirements" (p. 292). By implication, anything lying outside of the aforementioned requirements became unreasonable and intruded into areas best determined by voters through the political process of election campaigns. The right of voters to make "subjective discriminations" about which

candidates will make the best public officials implicitly became a benchmark of republican government guaranteed to each state by the Guarantee Clause.

***Woodward v. City of Deerfield Beach, 538 F.2d 1081 (1976).***

*Case summary.*

The legal dispute began in the U.S. District Court for the Southern District of Florida and ended in the U.S. Court of Appeals, Fifth Circuit. Wayne B. Woodward had wanted to run for the position of City Commissioner in Deerfield Beach, Florida. City officials excluded Mr. Woodward's name from the ballot because "he did not meet the requirements of the city's charter that candidates for that office be freeholders and residents for six months prior to the election" (p. 1081). At that point, Woodward filed suit in the U.S. District Court for Southern Florida in which he sought to "enjoin enforcement of those two charter provisions" by arguing that they violated his rights to equal protection of the laws as guaranteed by the Fourteenth Amendment (p. 1081). The federal Southern Florida District Court "held for the plaintiff" and enjoined "the city from omitting his name from the ballot," whereupon the City of Deerfield Beach appealed to the Fifth Circuit Court (p. 1081).

Attorney James Kincaid argued that Deerfield Beach's requirements for candidate qualification were "necessary to guarantee the election of responsible, knowledgeable city commissioners," particularly in a fast-growing city like Deerfield Beach that had become a "winter home community" for "10% to 25%" of its total residents (p. 1082). He argued that the freeholder requirement was necessary because a city commissioner "would participate responsibly ... only if he owned real property" (p. 1082). Kincaid also defended Deerfield Beach's residency requirement as being "necessary to insure voter knowledge of the candidate and candidate knowledge of the issues and problems of the area" (p. 1083). Attorney Steven

Squire, arguing for the plaintiff and appellee, Wayne Woodward, argued that the freeholder candidacy requirement was unconstitutional and cited the controlling Supreme Court decision on that point, *Turner v. Fouche*, 396 U.S. 346 (1970), where “[t]he Court rejected the argument that only taxpayers will act responsibly by pointing out that a resident who rents his home effectively pays the property taxes of his lessor as part of his rent” (p. 1082). Attorney Squire also attacked the legitimacy of the durational residency requirement, “arguing that there [was] no reason to presume that six months residence in a community would insure better knowledge of the problems or better voter knowledge of the candidate” (pp. 1083-1084). Squire, on behalf of Woodward, argued “that the voters should be the ones to decide the qualifications of the candidate and to determine whether they [felt] confident that they kn[e]w him” (p. 1084).

Circuit Court Judge Lewis Morgan delivered the opinion for the three-judge Fifth Circuit Court in which the Circuit Court “[a]ffirmed in part and reversed in part” the lower court’s decision (p. 1081). Also citing *Turner v. Fouche*, the Circuit Court affirmed the lower federal court’s holding that declared the freeholder candidacy requirement of Deerfield Beach was unconstitutional. According to Circuit Court Judge Morgan:

Limiting at any level the rights of members of the community to participate in the political process because of their economic station in life offends our most basic understanding of the nature of our government and society. ... [T]he promise of the Declaration of Independence “that all men are created equal” and that “Governments are instituted among Men, deriving their just powers from the consent of the governed,” requires that all members of the political community be considered equals. (p. 1083)

The Circuit Court opinion concluded its discussion of the freeholder requirement by citing from the 1964 Supreme Court opinion in *Reynolds v. Sims*, 377 U.S. 533, 565: “[R]epresentative government is in essence self-government through the medium of elected representatives of the

people, and each and every citizen has an inalienable right to full and effective participation in the political processes ...” (p. 1083).

The Fifth Circuit Court reversed the “district court’s ruling that the durational residency requirement [was] unconstitutional” (p. 1084). Noting that the three-judge court found “Mr. Woodward’s line of argument” about the durational residency requirement to be “persuasive,” the Fifth Circuit Court stated that such a line of argument was “precluded by certain provisions in the Constitution and by the Supreme Court” (p. 1084). Circuit Court Judge Morgan drew attention to the U.S. Constitution’s durational residency requirements:

[M]embers of the House of Representatives must be residents of the United States for nine years (U.S. Const., art. I, § 2), Senators must be residents of the United States for nine years (U.S. Const., art. I, § 3), and the President must be a resident of the United States for fourteen years (U.S. Const., art. II, § 1). (p. 1084)

The Fifth Circuit Court also cited Supreme Court rulings in *Chimento v. Stark* and *Sununu v. Stark* in which the Court rejected equal protection challenges to durational residency requirements in New Hampshire for “gubernatorial” and “state senator” candidates (p. 1084). Judge Morgan concluded for the Fifth Circuit Court:

In light of the inclusion of residency requirements in the Constitution and the recent Supreme Court decision upholding the constitutionality of a seven-year durational residence requirement for the office of state senator, we cannot find a durational residency requirement of six months for the office of city commissioner to be a violation of the equal protection clause of the Fourteenth Amendment. (p. 1084)

*Significance for the tenth amendment.*

Applying case law and the text of the U.S. Constitution to the legal dispute in *Woodward v. City of Deerfield Beach*, 538 F.2D 1081 (1976), the Fifth Circuit Court extended the Tenth Amendment legality of durational residency requirements to a political subdivision of a state, the City of Deerfield Beach. The Circuit Court also applied case law in declaring that the city’s



freeholder requirement for candidacy to office deprived Woodward of the equal protection of the law guaranteed to him by the Fourteenth Amendment. By implication, the ruling continued *Chimento*'s delineation of candidate qualifications as being related to reasonableness of age, citizenship, and residency.

***Antonio v. Kirkpatrick*, 453 F.Supp. 1161 (1978); 579 F.2d 1147 (1978).**

*Case summary.*

This case arose in Missouri and centered on a clash between the police powers of the state reserved by the Tenth Amendment (a ten-year durational residency requirement for the office of State Auditor) and the Equal Protection Clause of the Fourteenth Amendment. The federal district and circuit court opinions provide interest because, while reaching the same outcome, they purportedly did so by different means. The U.S. District Court for the Western District of Missouri, employing the more rigorous strict scrutiny test, held that the ten-year durational residency requirement for the office of State Auditor violated the plaintiff of the equal protection of the laws guaranteed by the Fourteenth Amendment and was thus unconstitutional. Upon appeal by the State of Missouri, the U.S. Eighth Circuit Court of Appeals: 1) ruled that the District Court had used the wrong test; 2) applied the less rigorous rational basis test; and 3) reached the same holding as the lower court. The case also provides interest because one of the unsuccessful defendants was later appointed to be the Attorney General for the United States. Finally, it is interesting to note that while the Circuit Court announced its decision on August 5th (in time to affect the then upcoming primary election), a written opinion wasn't provided until September 28, 1978.

James F. Antonio sought to be a Republican candidate for the office of Missouri State Auditor in "the August 1978 primary election" (453 F.Supp. 1161, 1162; hereafter cited as D.Ct.,

p. 1162). James C. Kirkpatrick, Missouri Secretary of State, upon advice from John D. Ashcroft, Missouri Attorney General, refused to certify Antonio as a State Auditor candidate because Antonio failed to meet the durational residency requirement. Two “active Republicans,” J. Anthony Dill and Julian J. Ossman, joined Antonio as plaintiffs in this action against defendants Kirkpatrick and Ashcroft in the federal Western Missouri District Court (D.Ct., p. 1162). Dill’s and Ossman’s joined because they were “citizens and voters” who wished “to have Antonio’s name on the ballot so that they [could] vote for him in the Republican primary” (D.Ct., p. 1162).

Plaintiff’s challenged the constitutionality of the ten-year durational residency requirement on several constitutional grounds. First the requirement violated the Equal Protection Clause “by creating a discriminatory classification which [was] not necessary to promote a compelling governmental interest of the State of Missouri” (D.Ct., p. 1163). The residency requirement also “infringed” plaintiffs’ “First Amendment rights of association and expression” (D.Ct., p. 1163). In addition “Antonio’s constitutional right to travel and right to be a candidate for public office [were] violated by the residency requirement” (D.Ct., p. 1163). Finally, the ten-year residency requirement violated

the guarantee of republican form of government set forth in Article IV, Section 4, of the United States Constitution, and abridge[d] the rights of plaintiffs Dill and Ossman to vote for the candidate of their choice and to associate in support of him. (D.Ct., p. 1163)

Relief sought by the plaintiffs included two holdings and two orders, one each directed separately at each of the two defendants. The desired holdings centered on a declaration that the ten-year durational residency requirement for Missouri State Auditor violated the U.S. Constitution “and the federally protected rights of these plaintiffs” as well as a “declaration that plaintiff Antonio [met] the lawful qualifications for the office of Missouri State Auditor” (D.Ct., p. 1163). The first court order sought by the plaintiffs involved

an Order directing defendant Kirkpatrick to accept the declaration of candidacy filed by plaintiff Antonio and to certify Antonio's name to local election authorities for the Republican ballot as a candidate for State Auditor at the August 1978 primary election. (D.Ct., p. 1163)

The second court order was to be directed to Missouri Attorney General Ashcroft in order to enjoin "defendant Ashcroft from enforcing in any manner the ten-year residency requirement so as to preclude plaintiff Antonio from being a candidate for the office of State Auditor or plaintiff's Dill and Ossman from voting for plaintiff Antonio" (D.Ct., p. 1163).

The Assistant Attorney General of Missouri provided legal representation for defendants Kirkpatrick and Ashcroft, Missouri's Secretary of State and Attorney General, respectively. He articulated "four 'rational bases' for Missouri's [ten-year durational residency] requirement" for candidates for Missouri State Auditor, which also represented "compelling state interests" as well (D.Ct., p. 1165). According to the defense arguments as described by District Court Judge Elmo B. Hunter, the ten-year residency requirement was necessary in order:

(1) to ensure that a public official holding a state-wide office has close ties with the state so that he has the interests of the state at heart and can understand its problems and needs; (2) to prevent frivolous, fraudulent or unqualified candidates; (3) to ensure a candidate's familiarity with the constituency and the problems of the state; and (4) to thoroughly expose the voters to the candidate prior to election. (D.Ct., p. 1165)

District Court Judge Hunter presented convincing reasons for using the strict scrutiny test to examine the challenged requirement. After discussing the existence of "two tests for use when an allegedly unconstitutional classification is at issue" that were developed by the U.S. Supreme Court and after briefly describing each test, Judge Hunter observed that the decision as to which test to use "depend[ed] upon 'the interests affected and the classification involved.'" *Dunn v. Blumstein*, ... 405 U.S. at 335" (D.Ct., pp. 1163-1164). Hunter then stated a legal observation

based upon a Supreme Court case, which in turn formed the basis for subsequent federal district and circuit court decisions.

The United States Constitution does not guarantee a right to hold public office to any person, but the equal protection clause does guarantee the right to be considered for such an office without the burden of invidiously discriminatory disqualifications. *Turner v. Fouche*, 396 U.S. 346 ... (1970); *Wellford v. Battaglia*, 485 F.2d 1151, 1152, (3d Cir. 1973); *McKinney v. Kaminsky*, 340 F.Supp. 289, 294 (M.D.Ala.1972). (D.Ct., p. 1164)

The District Court Judge next drew upon another Supreme Court decision when he declared, “Although the right to run for public office may not be as important or fundamental as the right to vote itself, the Supreme Court noted the interrelation between restrictions on the right to candidacy and restrictions on the right to vote in *Bullock v. Carter*, 405 U.S. 134, 142-43, ... (1972)” (D.Ct., p. 1164). Judge Hunter proceeded to connect *Bullock* and the current case by stating:

In *Bullock*, the Supreme Court mandated strict scrutiny where the limitation has a “real and appreciable impact on the exercise of the franchise.” 405 U.S. at 144... Such an impact is present in this case. See *Lubin v. Panish*, 415 U.S. 709 ... (1974). (D.Ct., p. 1164)

Judge Hunter buttressed the preceding citation with a citation drawn from another Supreme Court case involving candidacy requirements that he both summarized and quoted:

In addition, the Supreme Court has recognized that any limitations imposed by a state on the ability of candidates to obtain a position on the ballot necessarily places: “burdens on two different, although overlapping, kinds of rights – the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.” *Williams v. Rhodes*, 393 U.S. 23, 30 ... (1968). (D.Ct., p. 1164)

District Court Judge Hunter concluded:

This court’s determination of the applicability of the strict scrutiny standard in this case is not a novel approach to the issue. Almost unanimously,

federal courts have adopted the same standard in dealing with the issue of durational residency requirements for public office. (D.Ct., pp. 1164-1165)

In support of his conclusion, Hunter cited 12 federal court cases and characterized candidacy for public office as residing at “the heart of government” (D.Ct., p. 1165).

Although Judge Hunter announced the strict scrutiny test was the appropriate lens with which to examine the challenged ten-year durational residency requirement for Missouri State Auditor, he also stated that either the rational basis or the strict scrutiny test would yield the same outcome. According to Hunter, “As this opinion will outline, the result is the same under either test” (D.Ct., p. 1165, n. 3).

After reviewing the State of Missouri’s arguments, Judge Hunter noted their constitutional underpinning: “It is true that states, including Missouri, have the unquestioned right to impose reasonable restrictions on availability of the ballot.... That right is a police power reserved to the states under the Tenth Amendment to the United States Constitution” (D.Ct., p. 1165). And then the District Court Judge noted the limitation upon the State’s Tenth Amendment power: “But a state ‘may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.’ *Turner v. Fouche, supra*, 396 U.S. at 362-63” (D.Ct., p. 1165). At this point in the District Court opinion, Judge Hunter announced his preliminary finding, which he then proceeded to justify through a point-by-point analysis. According to District Court Judge Hunter, “In this case, plaintiffs’ rights are impermissibly burdened, for it is difficult to conceive how the requirement of ten years’ prior residency is necessary to effectuate any of Missouri’s stated objectives” (D.Ct., 1165). As Hunter explained, much in similar fashion to the federal New Hampshire District Court opinion’s emphasis upon the political process’s ability to provide both illumination about and discrimination between the various candidates and their abilities:

In these times of media and mass transportation, voters are thoroughly exposed to a candidate, and *vice versa*, throughout the rigorous primary and election campaign process, without the necessity of ten years' prior residency for that purpose. Certainly candidates who so desire can become familiar with their constituency and the problems of the state without residing here for ten years. (D.Ct., pp. 1165-1166)

Judge Hunter addressed each of the “rational bases” presented by the State of Missouri and found that the ten-year residency requirement lacked the ability to achieve the desired ends (D.Ct., p. 1165). Noting that “[a] residency requirement exclude[d] legitimate as well as frivolous candidates,” Judge Hunter further explained the classification deficiencies of the ten-year residency requirement for State Auditor:

The Missouri constitutional provision permits a ten-year resident of Missouri to be a candidate for State Auditor regardless of his lack of knowledge of the state and its problems, while it excludes more recent arrivals – for example, those who have resided in this state for nine and one-half years – who have had experience in government elsewhere or like plaintiff Antonio have experience in Missouri government, or who simply have made diligent efforts to become well acquainted with Missouri and its governmental operations. (D.Ct., p. 1166)

Having discussed the failure of Missouri's ten-year residency requirement to theoretically meet its intended objective, Judge Hunter next directed specific attention to how the residency requirement actually worked to exclude qualified candidates by examining the excluded plaintiff's qualifications and experience. Judge Hunter's fact-finding included the following educational qualifications of plaintiff Antonio that were relevant to the State Auditor's duties: a B.A. “degree in business, and both Masters and Doctor of Philosophy degrees in accounting” (D.Ct., p. 1167, n. 6). In addition Antonio was “a certified public accountant in the State of Missouri” (D.Ct., p. 1167, n. 6). Employment experience relevant to being the State Auditor included work “experience with several different accounting firms” as well as university experience in teaching accounting “at the University of Illinois, the University of South Florida,

and the University of Missouri” (D.Ct., p. 1167, n. 6). Specific work experience with the Missouri State Auditor’s office included the following as determined by Judge Hunter:

Mr. Antonio presently is Deputy State Auditor of the State of Missouri, a position he has held under three State Auditors. In that position, he is chief operating officer of the Auditor’s office, second in command, and responsible for the day-to-day management of the office and 100 staff members. He has experience as Acting State Auditor of Missouri, having been appointed to that position by governor Joseph P. Teasdale in 1977. (D.Ct., p. 1167, n. 7)

District Court Judge Hunter began to summarize the intersection of Missouri’s ten-year residency requirement for State Auditor with James Antonio’s qualifications, experience, and residence in Missouri.

It is conceded that plaintiff Antonio meets all other qualifications for the office of State Auditor, and the record herein further reveals that he is well-educated in the field of accounting and imminently knowledgeable about and experienced in the affairs of the State Auditor’s office. (D.Ct., p. 1167)

Judge Hunter continued:

He has resided in Missouri for almost eight of the past twelve years. Missouri’s durational residency requirement operates to exclude him from consideration by the voters of the State, and no compelling state interest has been shown to justify that exclusion. (D.Ct., p. 1167)

Hunter concluded:

[T]he instrument chosen by the State of Missouri to reach those objectives [the rational basis asserted by defendants] is far too imprecise to justify its continued use. Even though a governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly reached. *Shelton v. Tucker*, 364 U.S. 479, 488 ... (1960). (D.Ct., p. 1167)

Judge Hunter next conducted “a survey of the state of the law throughout the nation” and found that “[d]urational residency requirements for State Auditor are the exception rather than the rule. Only nine states currently have durational residency requirements as conditions of eligibility for the office of Auditor” (D.Ct., p. 1168). Regarding a ten-year residency

requirement for offices higher than that of State Auditor, Judge Hunter discovered “that only Missouri, Oklahoma, and Louisiana even have a ten-year residency requirement for the office of *Governor*” (Emphasis in original) (D.Ct., p. 1168). Hunter concluded, “Thus it is apparent that Missouri’s durational residency requirement for the office of State Auditor is the most stringent of any state in the nation” (D.Ct., p. 1168). According to Judge Hunter, the “survey of the state of the law throughout the nation supports this Court’s determination of the unconstitutionality of Missouri’s residency requirement for the office of State Auditor” (D.Ct., p. 1168).

The District Court Judge next examined “Missouri history with respect to the office of State Auditor” and found that a historical review failed “to support the finding of any compelling state interest in the ten-year residency requirement” (D.Ct., p. 1168). First of all, according to Hunter’s findings:

From 1820 until 1852, all State Auditors were appointed; the Constitution of 1820 provided no durational residency requirements for the office of State Auditor, Secretary of State, State Treasurer, or Attorney General, though there were five-year residency requirements for the offices of Governor and Lieutenant Governor. (D.Ct., p. 1168)

A constitutional amendment was adopted in 1850 requiring that “the offices of State Auditor ..., Secretary of State, Attorney General, and State Treasurer ... be elected by the qualified voters of the State” (D.Ct., p. 1168). The 1865 Constitution of Missouri, the State’s third constitution, was the first constitution in Missouri’s history to specifically list a residency requirement of five years for all “statewide elected officials” (D.Ct., p. 1168). Those requirements were carried forth into the 1875 Constitution of Missouri: however:

The 1945 Constitution, under which Missouri functions today, did not carry forth the five-year residency requirement from ... the 1875 Constitution. Instead, that requirement was deleted in its entirety and *no* durational residency requirement was imposed in the 1945 Constitution for the offices of Secretary of State, State Treasurer and Attorney General. (Emphasis in original) (D.Ct., p. 1169)



In fact, it was revealed that the residency requirement did not rest upon the actual text of the Missouri Constitution. Instead, it rested upon an *interpretation* of the Constitution, which, in turn, was not based upon any debates occurring in the 1945 Constitutional Convention. Article IV, § 13 of the 1945 Missouri Constitution stated, “The state auditor shall have the same qualifications as the governor” (D.Ct., p. 1169). Plaintiffs argued that the residency requirement for State Auditor “was imposed by the 1945 Constitution accidentally through the general requirement that he possess the same qualifications as the Governor” (D.Ct., p. 1169). Of course, a major source for resolving questions about constitutional interpretation was to be found in the records of the 1945 Missouri Constitutional Convention, a basic consideration that apparently never crossed the mind of the Missouri Attorney General, John Ashcroft, before he delivered his opinion to his fellow defendant in the case, Secretary of State Kilpatrick. As a result of examining the constitutional records, District Court Judge Hunter observed:

There is support for that argument in the transcribed record of the Constitutional Convention, which reveals that the ten-year requirement never was debated or even discussed. Instead, the focus of the Convention’s discussions was the provisions concerning the duties of the State Auditor, which prior to the adoption of Article IV, Section 13, in 1945, never had been set forth in the Missouri Constitution. (D.Ct., p. 1169)

Not content to have consulted only the text of the constitution and the debates of the constitutional convention, Judge Hunter also conducted an analysis of the State Auditor’s duties before and after the 1945 Missouri Constitutional Convention. This analysis showed a restriction in the duties of the Missouri State Auditor. According to the District Court Judge:

Prior to 1945, the State Auditor was responsible for collection of the state sales and income taxes and certain other fiscal matters. Those functions after 1945 were placed in a new Department of Revenue. In addition, rather than endowing the State Auditor with a comptroller function – a proposal specifically discussed and rejected by the Constitutional Convention – the

1945 Constitution expressly limited the State Auditor to post-audit functions. (D.Ct., p. 1169)

As Judge Hunter summarized:

[T]he 1945 Constitution, in *restricting* the duties of the office of State Auditor to post-audit functions, runs counter to any compelling interest in *increasing* the residency requirement for that office beyond the five years required by the Constitution of 1875. (Emphasis in original) (D.Ct., p. 1169)

Having considered the constitutional text and the records of the constitutional convention, as well as having conducted a pre-post 1945 analysis of the duties of the Missouri State Auditor, District Court Judge Hunter next conducted a comparative analysis of the residency requirements for State Auditor with those of other elected state officials in Missouri. He communicated his finding by stating, “Finally, it is significant that the 1945 Constitution imposed no durational residency requirement for the offices of Secretary of State, State Treasurer, or Attorney General” (D.Ct., p. 1170). Judge Hunter concluded:

Considering the functions and powers of these other statewide elective offices, and the impact of their exercise of power on the lives of the electorate, it appears patent that no compelling interest has been urged for the disparity in durational residency requirements between candidates for these offices and the office of State Auditor. (D.Ct., p. 1170)

Having completed his review of “Missouri history with respect to the office of State Auditor,” District Court Judge Hunter delivered the Court’s finding regarding the compelling interest argument of Missouri for the State Auditor residency requirement, which was followed immediately by the announcement of the Court’s first holding in the case (D.Ct., p. 1168; see also p. 557 previous):

Thus the history of the office of State Auditor in Missouri reveals no compelling state interest which ever has been expressed – or which now is apparent – for imposing a ten-year durational residency qualification for the office. Accordingly, for all the foregoing reasons, the requirement must fall

as violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution. (D.Ct., p. 1170)

Judge Hunter next addressed the rational basis aspect of Missouri's durational residency requirement for State Auditor.

“...[I]t further is the opinion of this Court that the ten-year requirement fails to satisfy the so-called “rational basis” test for the reason that it has neither logic, reason, nor experience to support it. The requirement of the Missouri Constitution that candidates for State Auditor must reside ten years in this state prior to election simply is not reasonably related to any of the objectives asserted by defendants or to any requirements of that office. (D.Ct., p. 1170)

The U.S. District Court for the Western District of Missouri next issued three orders. The first declared that the residency requirement for State Auditor violated the Equal Protection Clause of the Fourteenth Amendment. The second enjoined John Ashcroft as Missouri Attorney General “from enforcing in any manner the ten-year residency requirement for the Office of State Auditor” (D.Ct., p. 1170). The third enjoined James Kirkpatrick as Secretary of State “from refusing to accept plaintiff Antonio’s declaration of candidacy for the office of State Auditor” as well as “from refusing to certify plaintiff Antonio’s name to local election authorities to appear on the Republican ballot at the August 1978 primary election as a candidate for State Auditor” (D.Ct., p. 1170).

Secretary of State Kirkpatrick and Attorney General Ashcroft appealed Judge Hunter’s decision to the Eighth Circuit Court of Appeals who agreed to hear the case. Chief Judge Gibson announced the decision reached by himself as well as Circuit Judges Bright and Ross, which “affirmed the judgment of the District Court” (579 F.2d 1147, 1148; hereafter cited as C.Ct., p. 1148). While the decision was announced “on August 5,” the Eighth Circuit Court did not produce an “opinion set[ting] forth the reasons for that ruling” until September 28 of the same year (C.Ct., p. 1148). Although the federal Western Missouri District Court decision was

affirmed, the Eighth Circuit Court held that the District Court, in using the strict scrutiny test, had used the wrong test. According to Circuit Court Chief Judge Gibson:

Before abandoning the traditional standard of review [the rational basis test], a court must determine whether a State's limitation has a "real and appreciable impact" upon the fundamental rights allegedly affected. See *Bullock v. Carter*, 405 U.S. 134, 144 ... (1972). (C.Ct., p. 1149)

The Circuit Court concluded that the durational residency requirement for State Auditor "only minimally infringe[d] upon the rights of voters to participate in the election process," that "the requirement [did] not irretrievable foreclose a person from running for the office of State Auditor," and that "the relationship between the requirement at issue and the right to travel interstate [was] too attenuated to warrant invocation of the strict standard of review" (C.Ct., p. 1149). In the opinion of the Eighth Circuit Court of Appeals, "the proper standard for reviewing the provision of the Missouri Constitution imposing a durational residency requirement on aspirants to the office of State Auditor [was] the traditional reasonable basis test" (C.Ct., p. 1149). This, of course, ignored the part of the District Court opinion that had addressed the reasonable basis claims put forth by Missouri and had found them unconvincing (See D.Ct., p. 1165, n. 2; pp. 1165-1169; and p. 1170; see also p. 560 of this paper). Or, perhaps the Circuit Court simply expressed disagreement with the District Court's pronouncement that the strict scrutiny test was the appropriate one to apply. The latter interpretation appeared likely in light of additional statements made by the Circuit Court regarding the lower court's ruling that focused on a reasonable relationship between the requirement and the end sought: 1) "the district Court found that the ten-year requirement is not reasonably related to any of the asserted State interests or to any of the requirements of the office of State Auditor" (C.Ct., p. 1150); 2) paraphrased the District Court's statement that the decision was not "a novel approach," but fell within a considerable body of case law and directed readers to "[s]ee cases cited in District Court

opinion” (D.Ct., p. 1165; C.Ct., p. 1150, n. 4); 3) stated, “we are satisfied that the District Court correctly determined that the requirement of a ten-year residency for candidates for State Auditor does not bear a rational relationship to a legitimate State end” (C.Ct., p. 1151). The use of a functional analysis regarding the duties of the Governor and the State Auditor represented a unique aspect of the Circuit Court’s opinion. The Constitution explicitly required a ten-year durational residency for Governor while implicitly requiring the same durational residency requirement for State Auditor. However, the duties of each were quite different. According to the Eighth Circuit Court of Appeals:

The duties of State Auditor greatly differ from those of the Governor of a State. The latter position is the highest office of the State and involves broad discretion and policymaking powers. The position of State Auditor is more ministerial as its primary responsibility is post-auditing. These differences influence our evaluation of the State’s interests in maintaining the ten-year durational residency requirement as a qualification for the position of State Auditor. (C.Ct., p. 1151)

In such fashion was the opinion by the federal District Court for the District of Western Missouri affirmed by the Eighth Circuit Court of Appeals.

*Significance for the tenth amendment.*

*Antonio v. Kirkpatrick* represented a clash between the Tenth Amendment powers reserved to the State of Missouri and the individual rights guaranteed by the Fourteenth Amendment. The Eighth Circuit Court of Appeals determined that the rational basis for a ten-year durational residency requirement for State Auditor did not legally exist. Without either a rational basis or a compelling state interest, constitutional infringements by the state cannot prevail.

***Bullock v. Minnesota, 611 F.2d 258 (1979).***

*Case summary.*

This case continued the case law of clashes between Tenth Amendment powers reserved to the states (to establish minimum qualifications for office) and the Fourteenth Amendment protection of individual rights through the Equal Protection Clause (the right to be a candidate for public office). Arising out of a decision by the U.S. District Court for the District of Minnesota that was appealed to the Eighth Circuit Court of Appeals, *Bullock v. Minnesota* presents difficulties in understanding the full array of facts underlying the legal clash that would provide a richer contextual picture. This situation occurred because: a) the lower federal court opinion was unwritten and therefore not cited in the Eighth Circuit Court of Appeals opinion; and b) the Circuit Court opinion's chief characteristic was its extreme brevity.

Listed plaintiffs included three clerics: "Rev. Dick Bullock, Rev. Sharon Scarrella, and Rev. Lyle V. Rambo" (p. 259). Neither their denominations nor their current ministerial status were discussed. Because of their titles, it can be inferred that the three ministers belong to some branch of Protestant Christianity. The second-listed plaintiff, Rev. Scarrella, was the plaintiff who was actually denied access to candidacy "for the office of Minnesota Supreme Court Justice" because of a "Minnesota constitutional provision restricting candidacy to 'individuals admitted or entitled to be admitted to the practice of law in Minnesota'" (p. 259). Bullock's and Rambo's involvement in the case as co-plaintiffs was not discussed. Also neither stated nor discussed was the question underlying the legal clash regarding the motivation of a person for seeking the highest judicial position in a state who was trained in the ministry, but not in the law.

Plaintiffs argued that the Minnesota Secretary of State's "refusal to file nonattorney plaintiff Scarrella's papers for the office of Minnesota Supreme Court Justice" violated "Scarrella's civil rights" and that "membership in the Minnesota legislature of lawyers violate[d] the separation of powers clause of the Minnesota constitution" (p. 259). District Court Judge

Alsop “dismissed the suit for lack of subject matter jurisdiction” and because the “constitutional challenge to the candidacy restriction [was] barred by res judicata,” whereupon plaintiffs appealed to the Eighth Circuit Court of Appeals (p. 259). Circuit Court Judges Heaney, Ross, and Henley upheld the District Court’s dismissal of “the separation of powers claim” because it was a claim “based entirely upon the Minnesota constitution” and thus didn’t “present a federal question” (p. 259). The Eighth Circuit Court of Appeals disagreed with Judge Alsop’s reasons for dismissing the challenge to the candidacy restriction, but affirmed “the district court’s dismissal for the reason that this argument is without merit” (p. 259).

More fully confronting the clash between the Tenth and Fourteenth Amendments, the Eighth Circuit Court began by citing relevant case law, e.g., “The right to regulate elections and prescribe qualifications for statewide political offices is reserved to the states under the tenth amendment of the United States” (p. 259). Cases cited in support of the foregoing legal principle included *Antonio v. Kirkpatrick* and *Bullock v. Carter*. The Circuit Court also presented the counterbalancing legal principle, i.e., “States may not, however, regulate in a manner that violates equal protection. See *Williams v. Rhodes*...” (pp. 259-260). Of course case law also governed the process of determining which legal principle should prevail. According to the Eighth Circuit Court of Appeals:

The Supreme Court has indicated that the standard of review in access to public office cases must be determined by weighing the interests involved and the nature of the barrier’s impact upon voters. See *Bullock v. Carter*, *supra*, 405 U.S. , at 143 ...; *Antonio v. Kirkpatrick*, *supra*, 579 F.2d at 1149. (p. 260)

Although case law also governed the selection of which test should be used by the courts in determining the legal principle that should prevail in a particular clash of constitutional powers and rights, the Eighth Circuit Court stated that the issue was irrelevant in the current case since

“the provision [of the Minnesota Constitution] withstands constitutional scrutiny under both the rationally related and strict scrutiny tests” (p. 260). Noting that the Equal Protection Clause didn’t “prohibit a state legislature from adopting more rigorous standards for ensuring excellence in the judiciary than for other elective offices,” the Eighth Circuit Court concluded:

The requirement that candidates be eligible to practice law in Minnesota clearly advances the state’s compelling need to obtain candidates who are qualified to understand and deal with the complexities of the law. We conclude, therefore, that the restriction does not violate the equal protection clause. (p. 260)

The Eighth Circuit Court of Appeals affirmed both the reasoning and the judgment of the federal Minnesota District Court regarding the jurisdictional issue. Regarding the challenge to the candidacy requirements, the Circuit Court affirmed only the judgment, but not the District Court’s reasoning. In doing so, the Eighth Circuit Court demonstrated the reasoning that should have been used by the lower federal court.

*Significance for the tenth amendment.*

*Bullock v. Minnesota* illustrates the application of case law in resolving a conflict of two opposing legal principles, each of which is based on the U.S. Constitution. In this particular instance, the Tenth Amendment power of the State of Minnesota prevailed over individual rights protected by the Equal Protection Clause of the Fourteenth Amendment because a compelling state interest was successfully argued and legally demonstrated to undergird the candidacy requirement for state political office. The fact that the political office resided in the judicial branch of government (as opposed to either the executive or the legislative branches, both of which are more readily associated with public elections in the eyes of the electorate) provided additional interest.

***Matthews v. City of Atlantic City, N.J., 417 A.2d 1011 (1980).***



*Case summary.*

This is a New Jersey Supreme Court case that based its ruling on the case law emanating from federal court decisions. Like the previous cases, *Matthews v. City of Atlantic City* centered on the conflict between the two constitutional principles contained in the Tenth and Fourteenth Amendments to the U.S. Constitution, between the state's authority "to prescribe minimum qualifications for elective positions" and "the voter's right to exercise his franchise" without undue discrimination in violation of the Equal Protection Clause (pp. 1016 & 1013).

Michael Matthews, a registered voter of Atlantic City, wished to run for the office as one of five members of the board of commissioners, which was the elected governing body of Atlantic City having "all the executive, administrative, judicial and legislative powers" of the city's government (p. 1013, n. 1). Having lived previously in a different municipality in the same county as Atlantic City, Matthews had been a resident of Atlantic City for approximately five months before seeking election. His candidacy violated New Jersey's statutory "two-year residency requirement on candidates for office of city commissioner" (p. 1012). Matthews initiated legal action in the state court system "seeking a declaration that the two-year residency requirement for the office [of city commissioner] was unconstitutional" as well as a court order directing that his name be placed on the ballot for the upcoming municipal election (p. 1013).

Both the initial New Jersey trial court and the subsequent Superior Court, Appellate Division, upheld the constitutionality of the durational residency requirement for the office of city commissioner. Both courts based their ruling on a previous New Jersey Supreme Court decision, *Stothers v. Martini*, 6 N.J. 560, 79 A.2D 857 (1951), in which the N.J. Supreme Court "had upheld [the same durational residency requirement] against a similar attack," i.e., "an equal protection challenge" (p. 1013). Neither lower state court found any "basis for departing from

the reasoning or the result in that case” (p. 1013). Matthews appealed to the lower court decisions, arguing “that an examination of developments in constitutional law since *Stothers* leads to a result contrary to that reached in 1951” (p. 1014). The N.J. Supreme Court “granted certification” and “directed that the parties’ submit supplemental briefs to address the constitutionality of [the durational residency requirement for city commissioner candidates] under *Gangemi v. Rosengard*,” a 1965 N.J. Supreme Court decision that had invalidated a durational residency requirement for “officers in cities of the first class governed by the Faulkner Act [a New Jersey statute]” (p. 1013; p. 1013, n. 4; p. 1021).

After examining two Supreme Court decisions from 1972 in detail, *Bullock v. Carter* and *Dunn v. Blumstein*, the N.J. Supreme Court concluded:

We agree with plaintiff that since this Court decided *Stothers*, state legislation affecting the electoral process has been subjected to closer constitutional scrutiny. We should therefore reassess the reasoning and result of *Stothers* in the light of contemporary approaches to issues of equal protection. (p. 1015)

To outline the judicial approach that needed to be taken in the current legal dispute, the state Supreme Court offered the following quotation from *Dunn v. Blumstein*, 405 U.S. at 335:

To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. (p. 1015)

Noting first that the classification’s character was “not based on any ‘suspect’ criterion” and that the law drew “a distinction between residents solely on the basis of length of residence,” the state high court proceeded to examine the “individual interests affected by the classification” (p. 1015). Using existing case law, the N.J. Supreme Court recounted that while “the right to be a candidate for office has never been held by either the United States Supreme Court or this Court to enjoy ‘fundamental’ status,” it was also true that “the relationship between the right to vote

and the right to run for elective office cannot be ignored” (p. 1016). Citing state case law, the New Jersey Supreme Court observed, “An individual candidate’s fitness – including the depth or intensity of his knowledge or interest in local affairs – is ultimately an issue for the voters” (p. 1016). Proceeding to counterbalance the previous principle, the Court next opined, “Yet the existence of legislative authority to prescribe minimum qualifications for elective positions is as clear as the public’s right to be the ultimate judge of fitness” (p. 1016). Having fully established the dilemma presented the state’s high court, the N.J. Supreme Court proceeded to provide the next step in the form of another disagreement:

The extent to which the interests of the State may infringe upon the individual’s freedom of electoral choice determines the proper standard of judicial review. The parties here disagree over the content of that standard. Plaintiff claims that *Bullock* and *Dunn* require “strict scrutiny”; defendant and intervenors contend that because these cases do not address the present question, minimal scrutiny is all that is required. (p. 1016)

After an extensive review of federal case law governing the choice of the “proper standard” to be employed in examining a legislative classification, the state high court concluded, “Because here no fundamental right or basic necessity of life is denied, the burden does not assume constitutional proportions” (p. 1019). But, while strict scrutiny was not required, more than just a rational basis for the classification was needed since “the impact of a durational residency requirement for candidates” acted as “a significant intrusion into the voter’s freedom of choice” (p. 1020). In its attempt to balance “legislative interests in maintaining the integrity of the electoral process” with the “electorate’s freedom of choice,” the N.J. Supreme Court announced its first holding:

[W]e hold that a requirement or restriction for candidates for elective office must be reasonably and suitably tailored to further legitimate governmental objectives. We believe this to be consistent with the approach outlined in *Bullock* of “examining[ing] in a realistic light the extent and nature of [the] impact on voters of barriers to candidacy. (p. 1020)

In examining New Jersey's durational residency requirement for city commissioner candidates, the high court found that the requirement applied "to only 40 out of 567 municipalities in the State" as only approximately 7% of the state's municipalities operated under the "commission form of government" (p. 1021). In light of this fact, "the alleged justifications for the residency requirement [for city commissioners] los[t] meaning," according to the state high court (p. 1021). Pointing to its later ruling in *Gangemi*, the New Jersey Supreme Court quoted, "The purpose of the two-year registration provision being ... to assure an adequate interest in or understanding of civil affairs, *the question is why like assurance is not equally appropriate to all municipalities*" (Emphasis in original) (p. 1021). Noting that municipalities in New Jersey operated under various governmental structures, the state high court declared, "[T]hose differences cannot support distinctions among residency requirements under the various forms of local government" (p. 1022). The high court further noted that "[t]he vast majority of municipalities have *no* durational residency requirement for candidacy" (Emphasis in original) (p. 1022).

The New Jersey Supreme Court summarized its findings regarding the durational residency requirement for city commissioner candidates and pointed out the implications:

Because the right to vote is fundamental, the State has the affirmative burden of justifying why voters in some municipalities may vote only for candidates satisfying a two-year residency requirement while voters in other municipalities are not so restricted. It has failed to provide any sound justification why municipalities ... should be treated differently. (p. 1022)

The New Jersey Supreme Court announced its decision reversing the decisions by the two lower courts: "Based on the foregoing, we conclude that the durational residency requirement at issue violates the Equal Protection Clause of the Fourteenth Amendment" (p. 1022). The plaintiff, Michael Matthews, also received the order he had sought when he first initiated the legal action

bearing his name, that his name be “placed on the ballot for election to the office of city commissioner” (p. 1022).

*Significance for the tenth amendment.*

*Matthews v. Atlantic City* illustrates a state supreme court fulfilling its obligations under the Supremacy Clause of the U.S. Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (U.S. Constitution, Article VI, ¶ 2)

In resolving the conflict between Tenth Amendment rights asserted by the state and personal liberties guaranteed by the Fourteenth Amendment, the New Jersey Supreme Court based its decision primarily upon the federal case law generated by previous disputes of a similar nature. However, it also sprinkled in applicable New Jersey case law where appropriate. The case also illuminates the judicial mind at work in resolving conflicting constitutional claims, in sorting out conflicting legal arguments, in making findings of fact, and in applying the legal principles from existing case law to the case at hand. In this particular instance the state high court demonstrated the lack of a rational basis by the state for a differential classification scheme that negatively impacted the personal liberties of its citizens.

**The commerce clause versus the tenth amendment – Actions to diminish state autonomy in federal spheres.**

*National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937).*

*Facts & procedural history.*

As part of the New Deal legislation attempting to deal with the country’s economic malaise at a national level, Congress enacted the National Labor Relations Act (NLRA) in 1935

under its Commerce Clause authority to regulate interstate commerce. The NLRA established “the right of employees to self-organization and to bargain collectively through representatives of their own choosing” in businesses engaged in interstate commerce as well as businesses whose activities impacted interstate commerce (p. 24). In addition to defining “the terms ‘commerce’ and ‘affecting commerce,’” the Act also defined “unfair labor practices” and created a National Labor Relations Board (NLRB) to enforce the NLRA. The Act empowered the Board “to prevent the described unfair labor practices affecting commerce” and “prescribe[d] the procedure to that end” (p. 24). After providing notice, conducting a hearing, and making a finding supported by evidence, the NLRB was “authorized to petition designated courts to secure the enforcement of its orders” (p. 24). Finally, any party not satisfied with the final determination of the NLRB could “obtain a review in the designated courts” through the same procedure used by the Board to obtain a court order enforcing its decision (p. 24).

The Jones & Laughlin Steel Corporation discharged ten workers from its plant in Aliquippa, Pennsylvania where both steel and steel products were made. The workers fired by the company “were active leaders in the labor union” – “[s]everal were officers and others were leaders of particular groups” of employees (p. 28). The “Beaver Valley Lodge No. 200, affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America,” filed a complaint with the NLRB. The complaint charged

that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. The discriminatory and coercive action alleged was the discharge of certain employees. (p. 22)

Following the procedures detailed by the Act, the Board sustained the complaint and ordered the corporation to “cease and desist from such discrimination and coercion,” to reinstate the

discharged employees, to reimburse the employees for their lost pay, and to post a notice for thirty days stating that the corporation would not “discharge or discriminate against” current and prospective union members (p. 22). Following the Act’s procedures, the NLRB filed a petition with the Circuit Court of Appeals to have the NLRB’s order enforced. The Fifth Circuit Court “denied the petition, holding that the order lay beyond the range of federal power” (p. 22). Upon appeal, the Supreme Court “granted certiorari” (p. 22).

*Legal questions.*

Did the NLRA lie within the constitutional powers granted the federal government by the Commerce Clause of the U.S. Constitution, or instead, did the NLRA intrude into local affairs, the governance of which was reserved to the states by the Tenth Amendment? Did the NLRA requirements violate the due process requirements of the Fifth Amendment governing liberty of contract rights between employer and employee? Did the NLRA’s provisions regarding the NLRB and its procedural path in implementing the NLRA’s statutory requirements violate the Seventh Amendment or Article III, § 2, ¶ 1 of the Constitution?

*Legal reasoning of opposing parties.*

The context in which the legal reasoning of both the federal government and the steel corporation occurred illuminates the issues represented by the legal controversy. Previous Court rulings supported the steel companies position in challenging the NLRA’s constitutionality. The Court had held “that labor relations associated with manufacturing or production enterprises” had only an indirect effect upon interstate commerce, a holding which placed industrial labor disputes “beyond the legitimate scope of congressional power under the Commerce Clause” (Hall, 1992, pp. 572-573). Another line of Court holdings regarding employer-employee relations further bolstered the steel company’s legal challenge of congressional action. The

Court had formerly held “that liberty of contract was protected by the Due Process Clause of the Fifth Amendment” (Hall, 1992, p. 572). This meant, accordingly, that “under liberty of contract employers and employees had the right to bargain free of governmental interference” (Hall, 1992, p. 572).

*Stare decisis* regarding due-process liberty of contract and the indirect effects test of the validity of Commerce Clause legislation was countered by evidence that changing socioeconomic conditions had eroded the viability of the world view represented by previous Court holdings. Labor disputes had disrupted the nation’s commerce. A world-wide economic depression provided further evidence that a national response, as opposed to piecemeal, state-by-state or even laissez-faire approaches, was necessary to restore the country’s economic health. Furthermore, both the legislative and executive branches of government were united in the view that the federal government had the “national power to regulate the economy” (Hall, 1992, p. 573). President Roosevelt had “compared the depression to war” and had “proposed drastic and innovative legislation to deal with the crisis” which had been enacted by Congress (Hall, 1992, p. 393). Conservatives “opposed the government’s efforts to regulate the economy and especially its efforts to help labor and other underprivileged groups” (Hall, 1992, p. 393). The vast majority of the American people, “as evidenced in the 1936 election, overwhelmingly supported the New Deal” (Hall, 1992, p. 393). Not only had President Roosevelt carried every state in the Union except for Maine and Vermont, he also “had carried along with him so many Democratic candidates that when the new Congress met in January, 1937, it would be impossible to squeeze all seventy-five Democrats in the customary left side of the Senate chamber, and twelve freshmen would have to sit with the Republicans” (Leuchtenburg, p. 196). In terms of the popular vote, Roosevelt recorded “the largest plurality ever,” outpolling his opponent’s votes by



27, 476, 673 to 16, 679, 583 (Culver & Hyde, p. 168). Bolstered by the public support shown in the recent landslide elections and frustrated by the conservative bloc on the Court that had invalidated earlier New Deal legislation, Roosevelt proposed in early 1937 that legislation be approved “authorizing him to appoint additional justices to the Court in order to obtain a pro-New Deal majority” (Hall, 1992, p. 573). *NLRB v. Jones & Laughlin Steel Corporation* was argued and decided in the immediate aftermath of both the 1936 national elections and President Roosevelt’s Court-expansion proposal.

Attorneys for the federal government included both the Solicitor General and the Attorney General of the United States, who were assisted by eight additional attorneys. According to the federal attorneys, “The National Labor Relations Act [was] an exercise of the power of Congress to protect interstate commerce from injuries caused by industrial strife” (p. 6). They pointed out that the language of the NLRA consisted of words “plainly patterned upon language used in decisions of this Court in cases arising under other statutes enacted by Congress under the commerce power” (p. 7). Summing up the government’s position, the federal attorney’s stated:

[T]he National Labor Relations Act is designed solely to eliminate the burden on interstate commerce caused by industrial strife. Such strife constitutes an interruption to commerce operating directly without “an efficient intervening agency or condition.” Thus it deals with matters closely connected with commerce, does not go beyond what is necessary for the protection of commerce, and does not attempt “a broad regulation of industry within the State.” (p. 11)

The triumvirate of attorneys for the nation’s fourth-largest steel corporation argued “that the National Labor Relations Act [was], in reality, a regulation of labor relations, and not of interstate commerce, and that, as a consequence, it [was] not within the power of Congress to enact” (p. 12). This opening statement evoked Fifth Amendment *stare decisis* regarding due

process and liberty of contract between employer and employee that was to be free of government involvement. So ingrained in the fabric of the Court and the tenor of the times was this concept that it required no explicit mention by the by the industrial corporation's attorneys. The corporate attorneys attempted to paint the case as "a controversy between ten individuals who were formerly employed by the respondent in production work at this plant, and the [steel company]" (p. 12). Presenting the Tenth Amendment argument, the steel company's attorneys stated:

The jurisdiction of Congress under the commerce clause includes the power to regulate, restrict and protect interstate commerce; but not the right to use such jurisdiction as a pretext for legislation which interferes with the local sovereignty of the separate States. *Gibbons, v. Ogden*, 9 Wheat. 1. The use of an admitted power of Congress as a pretext to interfere with local activities which are not subject to its jurisdiction, is to be condemned. (p. 13)

According to the corporation's legal team, "the protection and establishment of labor organizations ... bear no reasonable relation to interstate commerce" (p. 14). Invoking *stare decisis* regarding the indirect effects test of the validity of Commerce Clause legislation, the corporate attorneys declared:

An unbroken line of decisions under the commerce clause has established that manufacturing and production activities are not in or a part of interstate commerce, even though they may be preceded or followed by the movement of materials between States. (p. 15)

To illustrate the corporation's contention that labor relations had nothing to do with interstate commerce, the corporate attorneys opined:

Like Congress, [the NLRB attorneys, or the petitioner], it has found itself faced with the task of piling premise upon premise and hypothesis upon hypothesis to reach the conclusion that the discharge of a few production employees at the respondent's plant has a vital bearing upon the movement of interstate commerce. (pp. 14-15)

Later the attorneys provided a concrete example of the previous abstraction just cited. The aforementioned premise was the government's contention "that strikes may and frequently do produce an inhibitory effect on the movement of interstate trade to and from the affected area" (p. 18).

An added assumption, representing a "fundamental error in the petitioner's argument," was that the government needed "only [to] establish the connection between strikes and the stoppage of commerce" (p. 18).

There has been no strike or labor dispute in the present case. In actuality, the petitioner means that the respondent's discharge of ten employees might have led to dissatisfaction, which might have led to a labor dispute, which might have led to a strike and a consequent interruption of interstate commerce. (pp. 18-19)

Finally, the steel corporation's attorneys creatively linked together the Fifth Amendment, the Seventh Amendment, and Article III, § 2, ¶ 1 of the U.S. Constitution to argue that the NLRA was unconstitutional. Article III, § 2, ¶ 1 declares, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States..." The Fifth Amendment requires that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law." The Seventh Amendment states, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..." According to the corporate legal defense team, the NLRA was invalid "because it authorize[d] the Board to award a money judgment, depriving the employer of his right to trial by jury in cases involving more than twenty dollars" (pp. 19-20). The money judgment was the "restoration to employment of the complaining employees, with back pay" (p. 20). However, if the government's arguments construing the case as "a suit in equity" were correct, "then the Act violate[d] the provision of Art. III of the Constitution, for it deprive[d] the constitutional courts of their authority to try constitutional and jurisdictional issues" (p. 20). Furthermore, The

NLRB's order directing the re-employment of discharged employees along with back pay violated the Fifth Amendment's due process and liberty of contract requirements by "constitut[ing] an unlawful interference with the right of the [steel corporation] to manage its own business" regarding "questions of employer-employee relationships" (p. 20). The steel corporation's legal team concluded by stating its opinion that "the underlying philosophy of the National Labor Relations Act [was] a constant threat to the respondent's normal right to manage its own business" (p. 21).

*Holding & disposition.*

With a 5-4 majority the Court overturned the Court of Appeals decision. The Court held that "the order of the NLRB was within its competency and that the Act [was] valid as here applied" (p. 49). The narrow Court majority also held that the "contention under the Seventh Amendment [was] without merit" (p. 49). Regarding the conflict between the Commerce Clause and the Tenth Amendment, the Court stated, "We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority" (p. 30). The Court swept away the Fifth Amendment due process arguments regarding liberty of contract, stating that "the right of employees to self-organization and to select representatives of their own choosing for collective bargaining .. without restraint or coercion by their employer" constituted "a fundamental right" (p. 33). The case was "remanded [to the Fifth Circuit Court of Appeals] for further proceedings in conformity with [the Court's] opinion" (p. 49).

*Court's rationale.*

Chief Justice Hughes delivered the Court's opinion that upheld the constitutionality of the NLRA, an act by which the federal government used its powers under the Commerce Clause to guarantee workers the right to unionize and to prohibit companies from subsequently

discriminating against union employees. *NLRB v. Jones & Laughlin Steel Corporation* was one of five opinions delivered by the Court on April 12, 1937, which sustained the NLRA's constitutionality.

The Court first reviewed the facts of the case, discussed the requirements of the Act, and summarized the arguments presented by the steel company's attorneys. The Chief Justice devoted three pages of the opinion to a discussion of the Labor Board's findings. The description of the Jones & Laughlin Steel Corporation's operations dispelled any idea of a localized operation engaged only in the production of steel. The picture painted by the Board's findings was that of a gigantic, vertically and horizontally integrated industrial giant. Jones & Laughlin owned nineteen subsidiaries and represented "a completely integrated enterprise, owning and operating [iron] ore, coal and limestone [mines], lake and river transportation facilities and terminal railroads located at its manufacturing plants" (p. 26). Citing the Labor Board's summary of the steel corporation's operations, the Court stated:

[T]he Labor Board concluded that the works in Pittsburgh and Aliquippa "might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the [steel company]; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated." (p. 27)

The Court continued:

To carry on the activities of the entire [Jones & Laughlin Steel Corporation's] industry, 33,000 men mine ore, 44,000 men mine coal, 4,000 men quarry limestone, 16,000 men manufacture coke, 343,000 men manufacture steel, and 83,000 men transport its product. Respondent has about 10,000 employees in its Aliquippa plant, which is located in a community of about 30,000 persons. (p. 27)

In examining the findings and orders of the NLRB, the Court ruled:

Upon that point it is sufficient to say that the evidence supports the findings of the Board that [the Jones & Laughlin Steel Corporation] discharged these men “because of their union activity and for the purpose of discouraging membership in the Union.” (p. 29)

Having thus set the stage, the Court began its analysis of the legal dispute’s “questions of law” advanced by the steel company’s attorneys in challenging the constitutionality of the NLRA. Noting the Tenth Amendment assertions, the Commerce Clause limits, and the claims that the Act’s purpose was to put “all industrial labor relations within the nation” under the control of the federal government, the Court observed:

If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. (pp. 29-30)

However, after introducing the legal principle that “an interpretation which conforms a statute to the Constitution must be preferred to another which would render it unconstitutional or of doubtful validity,” the Court thought “it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority” (p. 1; p. 30). Explaining its position, the Court noted that the definitions of “commerce” and “affecting commerce” contained in the Act were critical. According to the Court, “There can be no question that the commerce thus contemplated by the Act ... is interstate and foreign commerce in the constitutional sense” (p. 31). At this point, the Chief Justice directly connected, in a legal sense, labor relations to interstate commerce, which swept away previous Fifth Amendment due process considerations centered on freedom of contract. According to the Chief Justice:

It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. *Acts having that effect are not rendered immune because they grow out of labor disputes....* It is the effect upon commerce, not the source of the injury, which is the criterion. (Emphasis added) (pp. 31-32)

Regarding the Act's definitions of unfair labor practices, the Court raised the rights of workers to a level commensurate with that of owners. The right of workers to organize unions was "a fundamental right" (p. 33). In the Court's words, "Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents" (p. 33). According to the Court, unions were "essential to give laborers opportunity to deal on an equality with their employer" in resisting "arbitrary and unfair treatment" by the employer (p. 33).

After dealing with various court cases cited by the corporation's team of attorneys and finding that they were "not controlling here," the Court dealt with the steel company's contention that its "manufacturing operations" lay outside of the "stream of commerce," a contention bolstered by prior Court decisions. This discussion by the Chief Justice offered further explanation of the Court's finding that the NLRA operated within constitutional bounds. However, given the importance of the decision, it appeared that the Court wished to address each of the steel corporation's separate legal contentions. The Court asserted:

[T]he fact remains that the stoppage of those [manufacturing] operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities [detailed earlier in the decision], it is idle to say that the effect would be indirect or remote. (p. 41; for the Court's description of the steel company's operations, see pp. 562-563 of this paper)

The Court continued:

It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. (p. 41)

Similar in fashion to Cicero's conception of "true law" as being "right reason," a notion corresponding to the English common law's "test of 'reasonableness'" in reaching judicial

decisions that was described by Edward Coke as representing “common right and reason,” the Chief Justice sought to connect the law to practicality and actual experience (Corwin, 1965, pp. 10, p. 44). In this manner, C.J. Hughes seemed to be saying, prior decisions need to be disregarded when their corresponding case law no longer applies to changed conditions.<sup>69</sup> The Chief Justice accomplished this by first asking a rhetorical question:

When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? (p. 41)

Answering his own question, Chief Justice Hughes made explicit the need to connect legal decisions with the practical realities of current life. According to the Chief Justice, “We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience” (pp. 41-42). The Chief Justice continued:

*Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.* (Emphasis added) (p. 42)

Nearing the end of its decision, the Court dealt with the “procedural provisions of the Act” that were characterized by the steel corporation’s attorneys as violating either the Seventh Amendment or Article III, § 2, ¶ 1 of the Constitution. “But,” the Court noted, “these provisions, as we construe them, do not offend against the constitutional requirements governing the creation and action of administrative bodies” (pp. 46-47). “The Act,” the Court observed, “establishes standards to which the Board must conform. There must be complaint, notice and hearing. The



Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence” (p. 47). Finally, as the Court noted, the Board’s procedures and findings were subject to judicial review before any action could be taken.

The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. (p. 47)

According to the Court, judicial review was embedded in the Act through its procedural requirements and thus refuted corporate attorneys’ arguments regarding Article III.

We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation.... Respondent has no just ground for complaint on this score. (p. 47)

At the end of its opinion, the Court dealt with the Seventh Amendment argument presented by the corporate attorneys that the reinstatement of the discharged workers and reimbursement for lost pay amounted to a “money judgment” in contravention of the requirement regarding “trial by jury” (p. 48). After quoting the relevant portion of the amendment, the Court observed, “The Amendment thus preserves the right which existed under the common law when the Amendment was adopted” (p. 48). However, as the Court noted, the Seventh Amendment “has no application to cases where recovery of money damages is an incident to equitable relief” or “where the proceeding is not in the nature of a suit at common law” (p. 48). Was the current case a “suit at common law” or did it represent an “incident to equitable relief” (p. 48)? According to the Court:

The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies

appropriate to its enforcement. The contention under the Seventh Amendment is without merit. (pp. 48-49)

In announcing that the Fifth Circuit Court's judgment was "reversed," the Court concluded "that the order of the Board was within its competency and that the Act [was] valid as here applied" (p. 49).

*Concurring/dissenting opinions.*

The four remaining die-hard conservative justices who had formed the Court's core in striking down previous New Deal legislation dissented. Known as the "Four Horsemen" for their consistent opposition to the economic and social legislation of the New Deal, Justices George Sutherland, Willis Van Devanter, Pierce Butler, and James McReynolds based their dissent upon liberty of contract as protected by the Fifth Amendment's Due Process Clause and upon the indirect effects test reasoning of the Commerce Clause, i.e., "the view that labor relations associated with production enterprises were local in nature and affected interstate commerce only indirectly" (Hall, 1992, p. 309, p. 573).<sup>70</sup> The four justices had previously been joined in their views by the Chief Justice and Justice Owen Roberts, both of whom now voted to uphold the constitutionality of the NLRA.

The decision in *NLRB v. Jones & Laughlin Steel Corporation* overruled *Carter v. Carter Coal Company* with respect to collective bargaining and paved the way for the Court's ruling in *Darby* (See pp. 390-395 of this paper). The Court's view of the Commerce Clause now held that Congress could "reach and regulate not only interstate commerce itself but also any activity affecting commerce, whether directly or indirectly" (Hall, 1992, p. 573). The chain of decisions reflecting this view ran from *NLRB v. Jones & Laughlin Steel Corporation* through *Darby* (1941) and *Maryland v. Wirtz* (1968) through *Garcia* (1985). More recently, the *New York* and *Printz* decisions shakily construed the Tenth Amendment as acting to limit the application of the

Commerce Clause by congressional action, which is a modification of the previous case law emanating from *NLRB v. Jones & Laughlin Steel Corporation* (See the following discussions in this chapter: *National League of Cities v. Usery* for Rehnquist's "Tenth as a Declaration of Constitutional Policy" argument in the absence of a textual basis in the Amendment for the *National League of Cities* ruling; *National League of Cities v. Usery* for Brennan's critique of Rehnquist's position in the absence of textual support; *FERC v. Mississippi* for O'Connor's reiteration of Rehnquist's "Tenth as a Declaration of Constitutional Policy" argument in her dissenting opinion and for Blackmun's critique of O'Connor's lack of judicial reasoning in his majority opinion in *FERC v. Mississippi*; *Garcia v. San Antonio Metropolitan Transit Authority* for O'Connor's "Spirit of the Tenth Amendment" argument in her *Garcia* dissent, which was not based on either the text or existing case law; *New York v. United States* for O'Connor's opinion in *New York*, which was not based on either the text or existing case law of the Tenth Amendment, but upon an understanding and application of the federal framework; *New York v. United States* for Stevens' dissent in *New York* criticizing O'Connor's advocacy of the federal framework as justification for use of the Tenth Amendment; *Printz v. United States* for Scalia's "Structure of the Constitution" explanation; *Printz v. United States* for Stevens' critique in his *Printz* dissent of a) Scalia's structural argument, b) lack of textual and historical support for Scalia's argument, c) lack of precedent for Court's *Printz* ruling; and *Printz* for this author's comparison of Stevens' and Scalia's arguments).

***Wickard v. Filburn, 317 U.S. 111 (1942).***

*Facts & procedural history.*

Described as "the decision that best indicated how completely the Supreme Court had come in acquiescing to the nationalist economic philosophy of President Franklin Roosevelt,"

*Wickard v. Filburn*, along with *Mulford v. Smith* (1939), upheld the constitutionality of the Second Agricultural Adjustment Act, AAA II (Hall, 1992, p. 930). While *Mulford v. Smith* validated the tobacco quotas established under AAA II, *Wickard v. Filburn* upheld those for wheat, a more prevalently grown crop as it was grown in 47 of the 48 states at the time the case was decided (p. 125). Once again the legal battle involved a clash between the Commerce Clause and the Tenth Amendment regarding the Act's regulation of production. A secondary battle pitted differing interpretations of the Act's provisions. The Government's interpretation portrayed the Act as offering alternatives between sanctioned and penalized activities that didn't involve due process. In the opposing interpretation, Filburn's attorneys argued that the due process provisions of the Fifth Amendment were required since Filburn's wheat production and ensuing home-consumption lay outside the scope of permissible government regulation. From an historical perspective, the Court's opinion provided interest for its description of four categorical epochs regarding Commerce Clause adjudication by the nation's high court.

Roscoe C. Filburn, a small Midwestern farmer, filed suit in the U.S. District Court for the Southern District of Ohio against "the Secretary of Agriculture of the United States, three members of the County Agricultural Conservation Committee for Montgomery County, Ohio, and a member of the State Agricultural Conservation Committee for Ohio" (p. 113). Filburn's small farming operation consisted of "maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs" (p. 114). Each year Filburn planted and harvested a small crop of winter wheat, some of which he sold, some he fed to his livestock (a portion of which was sold), some was ground into flour for "home consumption," and some was kept for seeding the following year's crop (p. 114). His acreage allotment for wheat under AAA II was 11.1 acres @ 20.1 bushels per acre; however, Filburn planted and harvested 23 acres of wheat. Filburn was

subsequently assessed a penalty of 49¢ per bushel of excess wheat, which amount totaled \$117.11 (pp. 114-115).

In his suit Filburn contested the government's assessment and sought: 1) an order enjoining enforcement of the marketing penalty against himself for his 1941 wheat crop; 2) a declaratory judgment by the District Court "that the wheat marketing quota provisions of the Act ... were unconstitutional because not sustainable under the Commerce Clause or consistent with the Due Process Clause of the Fifth Amendment" (pp. 113-114). The District Court, consisting of three judges, "permanently enjoined the Secretary of Agriculture" from enforcing the Act against Filburn in a 2-1 decision (p. 113). Whereupon the federal government appealed the decision of the federal Southern Ohio District Court to the U.S. Supreme Court.

*Legal questions.*

Does the Commerce Clause (Article I, § 8, clause 3) authorize Congress to regulate production of goods "not intended in any part for commerce but wholly for consumption on the farm," or is such production "local in character," whose regulation is reserved to the states by the Tenth Amendment (p. 118; p. 119)? Does the penalty proscribed in the Act deprive Filburn of property without due process of law in contravention of the Fifth Amendment, or do sanctions result from the choice made by Filburn between desired and undesired activities in a field that is within Congress's power to regulate?

*Legal reasoning of opposing parties.*

Three attorneys argued on behalf of Filburn and were supported by three additional attorneys as *amici curiae*. The Solicitor General, assisted by the Assistant Attorney General and four other attorneys, provided legal representation for the Secretary of Agriculture and the other appellants named by Filburn.

Filburn's attorneys argued that the Agricultural Adjustment Act of 1938 regulated the "production and consumption of wheat," which were "beyond the reach of Congressional power under the Commerce Clause" because such activities were "local in character" and thus reserved to the states by the Tenth Amendment (p. 119). The production of wheat for home consumption had "at most" an indirect effect upon interstate commerce, and, since such production didn't constitute interstate commerce, it thus lay outside of Congress's power to regulate (p. 119). Filburn's attorneys further argued that the Act constituted "an unfair promotion of the markets and prices of specializing wheat growers" by "forcing some farmers into the market" to buy wheat for home use and consumption that they could have raised themselves (p. 129).

U.S. Government attorneys argued that the Agricultural Adjustment Act of 1938 regulated "only marketing," not production or consumption (p. 119). The Act defined "market," established "marketing quotas," and defined wheat that was produced on excess acreage as "available for marketing" (p. 119). Production and consumption were secondary to the regulation of marketing. Government attorneys posed a fallback position in case the Court ruled that the Act went "beyond the regulation of marketing" – in such a case, the Act was "sustainable as a 'necessary and proper' implementation of the power of Congress over interstate commerce" (p. 119).

Regarding the Fifth Amendment issue, Filburn's attorneys argued that since Filburn's production of wheat for home consumption lay outside of congressional power to regulate, the "Fifth Amendment require[d] that he be free from penalty for planting wheat and disposing of his crop as he [saw] fit" (p. 130). Government attorneys argued that the Act defined any wheat produced as wheat "available for market," that in regulating the market of wheat through control of the total supply, "the Government gave the farmer a choice which was ... designed to

encourage cooperation and discourage non-cooperation” (p. 119; p. 130). Penalties flowed from choices made by individual farmers and did not represent a denial of due process.

*Holding & disposition.*

The lower court decision was reversed. The Agricultural Adjustment Act of 1938 represented a valid exercise of Congressional power under the Commerce Clause. Penalties provided by the Act did not constitute a denial of due process under the Fifth Amendment.

*Court’s rationale.*

Justice Robert Jackson delivered the 9-0 decision of the Court in *Wickard v. Filburn* upholding the constitutionality of the Agricultural Adjustment Act of 1938, a decision which further validated the U.S. Government’s ability to establish marketing quotas in its regulation of the nation’s commerce. The Court’s ruling gave additional judicial sanction to an increased federal commerce power based upon economic realities, not upon predetermined formulas or abstract definitions. In the words of the Court:

[Q]uestions of the power of Congress [under the Commerce Clause] are not to be decided by reference to any formula which would give controlling force to nomenclature such as “production” and “indirect” and foreclose consideration of the *actual effects of the activity in question upon interstate commerce*. (Emphasis added) (p. 120)

In reviewing the history of “the course of decision[s] under the Commerce Clause,” the Court delineated four main periods of judicial activity. The first period was represented by Chief Justice Marshall’s articulation of the Commerce Clause powers of the federal government in *Gibbons v. Ogden*. Justice Jackson emphasized Chief Justice Marshall’s description of “the embracing and penetrating nature of this power” and summarized Marshall’s warning “that effective restraints on its exercise must proceed from political rather than from judicial processes” (p. 120).

The second period of Court decisions, however, “dealt rarely with questions of what Congress might do” under the Commerce Clause and focused “almost entirely with the permissibility of state activity” that interfered or not with interstate commerce (p. 121). During this period, as well as the period immediately following, the frame of reference was not “what was ‘necessary and proper’ to the exercise by Congress of its granted power;” instead the focal point was state sovereignty, or as the Court phrased it, “some concept of sovereignty though to be implicit in the status of statehood” (p. 121). This time period witnessed the emergence of case law defining “[c]ertain activities such as ‘production,’ ‘manufacturing,’ and ‘mining’” as being “within the province of state governments and beyond the power of Congress under the Commerce Clause” (p. 121).

The third period of Court decisions commenced in 1887 “with the enactment of the Interstate Commerce Act,” which was “followed in 1890 by the Sherman Anti-Trust Act” (p. 121). Described by Justice Jackson as the beginning of a period when “the interstate commerce power began to exert positive influence in American law and life,” these two statutes “required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder” (p. 121). However, although the focus now became the federal use of the commerce power instead of state activity, “the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress” (pp. 121-122). The child labor cases (*Hammer v. Dagenhart* & *Bailey v. Drexel Furniture Company*) and the decisions striking down previous New Deal legislation are representative of this period. Although the period was dominated by the reasoning just described, there were a few other cases that “called forth broader interpretations of the Commerce Clause” that were “destined to supercede the earlier ones, and to bring about a return to the principles first enunciated by Chief



Justice Marshall in *Gibbons v. Ogden*” (p. 122). The period generally illustrated Heifetz’ conception of adaptive work in progress whereby old beliefs and values were being challenged by the urged adoption of new values and beliefs, such work requiring time and difficult adjustments on the part of people and societal institutions (See pp. 83-87 of this paper).

The fourth period of Court decisions marked a complete return to the judicial principles articulated by Marshall and commenced with “[t]he Court’s recognition of the relevance of the economic effects in the application of the Commerce Clause ... [that] has made the mechanical application of legal formulas no longer feasible” (pp. 123-124). If the third period is dated from the enactment of the Interstate Commerce Act in 1887 to the *Darby* decision in 1941, the period of adaptive work required in order to make the focal-point transition from Tenth Amendment state sovereignty to the Court’s original conception of the Commerce Clause in *Gibbons v. Ogden* lasted approximately 64 years. The Court explained what no longer worked in adjudicating questions arising from Congressional regulation of interstate commerce:

Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be “production,” nor can consideration of its economic effects be foreclosed by calling them “indirect.” (p. 124)

The Court then explained what would be material for deciding questions of federal power under the Commerce Clause. According to the Court, “[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce” (p. 125).

The Court next summarized the “economics of the wheat industry” and reached certain findings (p. 125). First, the decline in the export trade of wheat from the 1920’s to 1940 “left a large surplus in production which ... caused congestion in a number of markets” (p. 125).

Second, the other three large wheat-exporting countries (Argentina, Australia, and Canada) had “sought to modify the impact of the world market conditions on their own economy,” had “all undertaken various programs for the relief of growers” which “have generally evolved towards control by the central government,” and all possessed “federated systems of government” (p. 125; p. 126; p. 126; p. 126, n. 27). The third finding of the Court combined an analysis of the world wheat situation with the effect of regulation on wheat production in the United States:

In the absence of regulation, the price of wheat in the United States would be much affected by world conditions. During 1941, producers who cooperated with the Agricultural Adjustment program received an average price on the farm of about \$1.16 a bushel, as compared with the world market price of 40 cents a bushel. (p. 126)

Continuing its survey of the national wheat economy, the Court next focused attention on the issue of “consumption of home-grown wheat” and its effects upon interstate commerce (p. 127). “Consumption on the farm where grown” amounted to more than “20 per cent” of the nation’s total production of wheat (p. 127). While Filburn’s own wheat production for home consumption was “trivial by itself,” it was part of a much larger picture (p. 127). Filburn and “others similarly situated” had an effect on the demand for wheat that was “far from trivial” (p. 128). The consumption of home-grown wheat supplied “a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense compete[d] with wheat in commerce” (p. 128). Turning to the intersection of national wheat economics and the policy enacted by Congress in the Agricultural Adjustment Act of 1938, the Court noted that Congress had “considered that wheat consumed on the farm where grown, if [left] outside the scheme of regulation, would have a substantial effect in defeating and obstructing [the Act’s] purpose to stimulate trade therein at increased prices” (p. 129). The Court concluded, “It is well established by decisions of this Court that the power to regulate

commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices” (p. 128).

The Court next turned to the Fifth Amendment issues raised by *Filburn* regarding the Act’s penalties. Agreeing with arguments presented by the Government’s attorneys, the Court ruled that farmers were given a choice. According to the Court, “The farmer who planted within his allotment was in effect guaranteed a minimum return much above what his wheat would have brought if sold on a world market basis” (p. 130). Farmers choosing to plant in excess of their allotted acreage were also given further options, ranging from no penalty to being assessed a penalty. Such farmers could “escape penalty by delivering [the excess wheat] to the Secretary” or he could store it “with the privilege of sale without penalty in a later year to fill out his quota” (p. 130). The Court further noted that because of the Act, *Filburn* was “able to market his wheat at a price ‘far above any world price based on the natural reaction of supply and demand’” (p. 131). According to the Court, “We can hardly find a denial of due process in these circumstances.... It is hardly lack of due process for the Government to regulate that which it subsidizes” (p. 131). The Court concluded:

That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that, if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law. (p. 133)

If *Darby* marked the Court’s return to the Court’s original conception of the Commerce Clause powers of the federal government as articulated by the Court in *Gibbons v. Ogden*, the decision in *Wickard v. Filburn* confirmed the Court’s reinstatement of the nation’s ability to regulate its commerce. *Wickard*’s additional contribution was its stipulation that economic

realities and actual effects upon commerce would determine what fell within the legitimate reach of the Commerce Clause.

*Concurring/dissenting opinions.*

Being a unanimous decision, no dissenting opinions were offered.

***Hines v. Davidowitz, 312 U.S. 52 (1941).***

*Facts & procedural history.*

Constitutionally, this case represented a clash between the powers reserved to the states by the Tenth Amendment on the one hand and both the Supremacy Clause and the Equal Protection Clause of the Fourteenth Amendment on the other hand. The subject matter centered on the registration of aliens in the United States.

In the absence of federal legislation governing the registration of aliens, several states enacted their own legislation requiring aliens to register with state authorities.<sup>71</sup> On June 21, 1939, the Commonwealth of Pennsylvania passed the Alien Registration Act which required all aliens “18 years or over” to register annually with the Pennsylvania Department of Labor and Industry, to pay an annual registration fee of \$1 in return for an “alien identification card,” and to “show the card whenever it may be demanded by any police officer or any agent of the Department of Labor and Industry” (p. 59). The Pennsylvania legislation also required the Department of Labor and Industry to classify the alien registrations “for ‘the purpose of ready reference,’” and to furnish “a copy of the classification to the Pennsylvania Motor Police” (p. 59).

Davidowitz, an alien, and “one naturalized citizen” filed suit against Hines, the Pennsylvania Secretary of Labor and Industry, and other state officials in the U.S. District Court for the Middle District of Pennsylvania. The “three-judge District Court enjoined enforcement

of the Act, holding that it denied aliens equal protection of the laws, and that it encroached upon legislative powers constitutionally vested in the federal government” (p. 60). Pennsylvania’s appeal to the nation’s high court was granted; however, in the intervening time between the Court’s granting the appeal and hearing arguments from the two parties, Congress “enacted a federal Alien Registration Act” (p. 60). Accordingly, the Court reviewed the legal questions surrounding Pennsylvania’s alien registration law “in the light of the Congressional Act” (p. 60)

*Legal questions.*

Does the Pennsylvania Alien Registration Act represent a valid exercise of state police power under the Tenth Amendment, or does it contravene the Supremacy Clause of the Constitution as articulated in Article VI, Clause 2? Does the Pennsylvania statute deny aliens within its borders the equal protection of the law in contravention of the Fourteenth Amendment? Does the Pennsylvania legislation violate § 16 of the Civil Rights Act of 1870?<sup>72</sup>

*Legal reasoning of opposing parties.*

Mrs. Rutherford and Mr. Rial, Deputy Attorneys General of Pennsylvania, along with Mr. Reno, Attorney General, provided legal representation for the Commonwealth of Pennsylvania. Attorneys Ostroff and Steerman represented Davidowitz and other appellees. “By special leave of Court, Solicitor General Biddle, with whom Assistant Attorney General Shea and Messrs. ... Siegel, ... Demuth, and ... Davis were on the brief, for the United States, as *amicus curiae*” in support of Davidowitz (p. 56).

Using a Commerce Clause approach, attorneys for Pennsylvania argued that their state’s legislation didn’t impair the “right of the Federal Government to control immigration, naturalization or interstate and foreign commerce” (p. 53). While conceding that Article I, § 8, Cl. 3 of the Constitution gave “exclusive power” to Congress over immigration and

naturalization, the Commerce Clause did “not place entire jurisdiction over aliens” with Congress (p. 54). According to Pennsylvania’s attorneys, “the States under the police power can place restrictions and limitations upon aliens” (pp. 54-55).

As a fallback position in the event that the Court viewed “control of aliens [as being] within the exclusive power of Congress,” the Commonwealth’s legal team argued that “the State still [had] the right, as a local police measure, to regulate aliens resident within its borders, so long as such regulations [were] not repugnant to or inconsistent with federal enactments” (p. 55). This, in effect, represented a Tenth Amendment argument as case law upheld state police powers over their citizens. According to Commonwealth attorneys, “Congress ha[d] no general power to enact police regulations operative within the territorial limits of the State” (p. 53). Such power had been “left with the individual States” by the Tenth Amendment and could not “be taken from them either wholly or in part” (p. 53). The general rule provided that “the States may exercise any power possessed by them prior to the adoption of the Constitution, unless the exercise of such power [was] expressly or by necessary implication prohibited thereby” (p. 53). Furthermore, “[l]egislation under the police power of the State [would] not be stricken down unless it plainly and palpably conflict[ed] with some authority granted to the Federal Government” (p. 54). Commonwealth attorneys cited two previous Court decisions embodying the principle that “[a] State may pass a law which aids or cooperates with the Federal Government in the exercise of its federal power” (p. 54). According to Pennsylvania’s legal counsel, “The only question is whether the State Act is in abeyance or whether the state and federal Governments have concurrent jurisdiction to register aliens for the protection of inhabitants and property” (p. 55). Regarding the federal Middle District Court of Pennsylvania ruling that the Pennsylvania statute “denied aliens equal protection of the laws,” Pennsylvania’s

attorneys offered no argument other than to simply state, “The Act does not deny equal protection of the laws to aliens” (p. 60; p. 55).

Arguments by attorneys for Davidowitz were summarized in three sentences and supported by five case citations:

The Act is discriminatory, unreasonable, inconsistent and capricious. The Act encroaches upon a field reserved to federal action. *People v. Baum*, 251 Mich. 187; *Truax v. Raich*, 239 U.S. 33, 39; *Arrowsmith v. Voorhies*, 55 F.2d 310; *Henderson v. Mayor of New York*, 92 U.S. 259; *Chy Lung v. Freeman*, 92 U.S. 275. The Act denies equal protection of the laws to aliens in Pennsylvania. (p. 56)

As can be detected from reading the citations, three were U.S. Supreme Court decisions, one a federal lower court decision, and one a state court decision. One can only surmise from the previous success gained by Davidowitz that arguments presented by his attorneys to the U.S. District Court for the Middle District of Pennsylvania contained greater elaboration than those reported here. Of course, such argumentation would be contained in the lower court’s decision, which had been forwarded to the Supreme Court, and thus would have been available for review by the Justices.

Arguments presented by the Solicitor General, Assistant Attorney General, and three additional attorneys as *amicus curiae* focused exclusively on the Supremacy Clause. Their opening statement declared, “The federal Act of 1940 has superseded the Pennsylvania statute” (p. 56). Citing fourteen Supreme Court decisions in support of the following contention, the federal attorneys stated, “The enactment by Congress of this comprehensive and integrated alien registration system precludes the exercise of any concurrent authority by the States” (p. 56).

Government attorneys obliquely addressed the issue of equal protection of the laws as part of their Supremacy Clause arguments by pointing to the conflict between state law and federal policy as enacted by Congress:

*The Pennsylvania statute is also unenforceable because it is in conflict with the Congressional policy embodied in the federal law. Congress provided various safeguards to protect the civil liberties of aliens and to guard them against the vexation of intrusive police surveillance. (Emphasis added) (p. 57)*

Worse yet, the federal attorneys continued, “The Pennsylvania statute contain[ed] no similar safeguards; to the contrary, it [was] fraught with the very dangers which Congress sought to prevent” (p. 57). In order to enforce “the Congressional purpose to protect the civil liberties of aliens,” it was required that “the federal government retain the power to control and coordinate all activities with respect to registration and surveillance” (p. 58). Government attorneys contended that the Congressional policy could not be enforced if the states were “permitted to enact and administer independent registration systems” (p. 58). State action in this field would require “the express consent of Congress,” which had not been given (p. 58). Finally, the federal attorneys stated that the Pennsylvania Act was “in conflict with § 16 of the civil Rights Act of 1870” (p. 59).

*Holding & disposition.*

The Court held that “the Pennsylvania Act cannot be enforced,” and thus affirmed the judgment of the lower federal court. The Court’s decision, similar in structure to the arguments presented by the federal attorneys, rested upon the Supremacy Clause through which the Court addressed, again under the color of Article VI, Cl. 2 of the Constitution, the equal protection concerns arising under the Civil Rights Act of 1870 and the Fourteenth Amendment. In this particular instance, equal protection was treated as a federal policy that was embodied by Congressional legislation.

*Court’s rationale.*



Justice Black delivered the 8-1 decision of the Court. After discussing the facts of the case, Justice Black summarized the contentions of opposing attorneys. Noting that all contentions were subsidiary to the question involving the conflict between the Tenth Amendment and the Supremacy Clause, Justice Black launched into an analysis of the intersection of Article VI, Clause 2 with the subject matter of the two legislative actions. The Court quickly established the contextual grounding of alien registration in “the field affecting foreign relations” and noted that the Federal Government was “entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties” (p. 63). Taking care to illustrate the reasons for the commitment of foreign affairs to the Federal Government, Justice Black brought to bear explanations expounded by the Court as well as three of the Founding Fathers. In the *Chinese Exclusion Case*, 130 U.S. 581, 606 (1889), the Supreme Court stated, “For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power” (p. 63).<sup>73</sup> Introducing Thomas Jefferson as one “who was not generally favorable to broad federal powers,” Justice Black provided the following from Jefferson’s writings: “My own general idea was, that the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty” (p. 63, n. 11). Black immediately followed by quoting James Madison who wrote “in Federalist paper No. 42”:

The *second* class of powers, lodged in the general government, consist of those which regulate the intercourse with foreign nations.... This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations. (Emphasis in original) (p. 63, n. 11)

Justice Black concluded the reasoning behind federal control of foreign relations by citing Alexander Hamilton's writing "in Federalist paper No. 80: 'The peace of the *whole* ought not to be left at the disposal of a *part*. The Union will undoubtedly be answerable to foreign powers for the conduct of its members'" (Emphasis in original) (p. 64, n. 12). Having grounded alien registration in foreign affairs, having established the constitutional control of foreign affairs by the Federal Government, and having illustrated the Founders' explanations as to the reasons for federal control of foreign affairs, Justice Black proceeded to illustrate that Congress was aware of the grounding of alien registration in the nation's foreign affairs. To establish the nexus between constitutional requirements and Congressional understanding "of the possible international repercussions of registration legislation," Justice Black quoted Congressman Coffee's remarks from the floor when he spoke against an earlier version of the contested federal Alien Registration Act: "Are we not guilty of deliberately insulting nations with whom we maintain friendly diplomatic relations? Are we not humiliating their nationals? Are we not violating the traditions and experiences of a century and a half" (p. 64, n. 12)?

Based on the reasoning previously presented, the Court concluded:

Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, "the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it. (p. 66)

Proceeding cautiously, the Court majority confronted Pennsylvania's claim that the Pennsylvania Alien Registration Act represented "concurrent jurisdiction" by the state and national governments "to register aliens" (p. 55). The Court concluded that appellee arguments presented by the federal attorneys as *amicus curiae* were "correct in [their] contention that the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously

existing concurrent power of state and nation” (p. 68). The Court next proceeded to examine whether or not Congress had “acted in such manner that its action should preclude enforcement of Pennsylvania’s law” (p. 69). This maneuver provided the stage for the Court to address the equal protection concerns raised by both the Fourteenth Amendment and the Civil Rights Act of 1870. Following a lengthy examination of federal action regarding aliens in terms of laws and treaties, grounded in objections historically made to harsh measures, the Court observed that most opposition to registration bills was grounded in the fact “that their requirements were at war with the fundamental principles of our free government” (p. 71). According to the Court, equal protection concerns constituted a national policy enacted into law by Congress through the U.S. Alien Registration Act.

[Congress] plainly manifested a purpose to [“obtain the information deemed to be desirable in connection with aliens”] in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, *and to leave them free from the possibility of inquisitorial practices and police surveillance* that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against. (p. 74)

Because of the Supremacy Clause, and because the Pennsylvania Act opposed a federal policy bent on preserving the right of equal protection of the laws for aliens, “the Pennsylvania Act cannot be enforced” (p. 74). Thus the result of the lower court decision was affirmed, but the ground for the decision shifted from primary focus on the Equal Protection Clause of the Fourteenth Amendment to a primary focus on the Supremacy Clause of the United States Constitution that incorporated, but did not rest upon, equal protection concerns.

*Concurring/dissenting opinion.*

Justice Stone was the lone Justice voting against the 8-1 Court majority. He dissented because of his reluctance to “strike down a state law which [was] immediately concerned with

the social order,” because he didn’t believe the Pennsylvania statute violated “some right granted or secured to the national government by the Constitution,” and because he didn’t view the Pennsylvania Act as “encroach[ing] upon the exercise of some authority delegated to the United States for the attainment of objects of national concern” (p. 75).

***Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).***

*Facts & procedural history.*

This case represented a critical constitutional challenge to the public accommodations provisions contained in Title II of the 1964 Civil Rights Act. The challenge pitted the Commerce Clause against an implied Tenth Amendment argument, i.e., it was charged the “Act exceeded its power to regulate commerce;” this could only happen if the Act regulated something other than interstate commerce that was reserved to state jurisdiction by the Tenth Amendment; hence, although not specifically stating the Tenth Amendment, the Amendment’s authority was implied by the charge (p. 243). The challenge also involved Fifth Amendment due process and Thirteenth Amendment involuntary servitude concerns.

On June 19, 1963, approximately five months before he was assassinated in Dallas, Texas, President John F. Kennedy proposed to Congress that it enact civil rights legislation. In his speech to Congress, President Kennedy stated the purpose of the proposed civil rights bill, which was:

to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in ... public accommodations through the exercise by Congress of the powers conferred upon it ... to enforce the provisions of the fourteenth and fifteenth amendments, to regulate commerce among the several States, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution. (p. 245)

Following President Kennedy’s speech, bills “embodying the President’s suggestion” were introduced in both the Senate and the House (p. 246). The Civil Rights Act of 1964 was not

passed, however, until July 2, 1964, when President Johnson intervened and recommended its passage. In constructing the final form of the Act, Congress used the Commerce Clause of the Constitution as its primary authority. They did so “because the *Civil Rights Cases* (1883), as then interpreted, prohibited [Congress] from enforcing the Fourteenth Amendment against privately owned restaurants and hotels” (Hall, 1992, p. 369). Title II of the Act provided that:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin. (p. 247)

To establish the nexus with commerce, the Act declared “that ‘any inn, hotel, motel, or other establishment which provides lodging to transient guests’ affects commerce *per se*” (p. 247). § 201 of Title II listed “four classes of business establishments, each of which ‘serve[d] the public’ and ‘[was] a place of public accommodation’” (p. 247). The term, “a place of public accommodation” was defined as a place whose “operations affect[ed] commerce, or if discrimination or segregation by it is supported by State action” (p. 247). Discrimination or segregation was “supported by state action when carried on under color of any law, statute, ordinance, regulation or any custom or usage required or enforced by officials of the State or any of its subdivisions” (p. 248). Thus, any public accommodation located within a city, county, or state governed by laws supporting or requiring racial segregation was now prohibited from such practice by the Civil Rights Act of 1964.

The owner of the Heart of Atlanta Motel “had 216 rooms available to transient guests” (p. 243). Located close to two interstate highways as well as two state highways, the Heart of Atlanta Motel solicited “patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation” (p. 243). As a result of its

proximity to interstate & highway travel and the solicitation of out-of-state business, “approximately 75% of its registered guests [were] from out of State” (p. 243).

The Heart of Atlanta Motel owner had long followed “a practice of refusing to rent rooms to Negroes” (p. 243). In order to “perpetuate” his policy of discrimination, the motel owner filed action in the U.S. District Court for the Northern District of Georgia suing “for declaratory relief” and seeking an order “to enjoin enforcement of the Civil Rights Act of 1964” (p. 241).

The owner of the Heart of Atlanta Motel also sought “damages against [the Government] based on allegedly resulting injury in the event compliance was required” (p. 243). The Federal Government filed a counterclaim seeking enforcement of the Civil Rights Act and “asked for a three-judge court” to hear the case (p. 243). During the district court proceedings, the motel owner “offered no evidence,” but instead submitted “the case on the pleadings, admissions and stipulation of facts” (p. 244). The facts to which the motel owner admitted were that “the operation of the motel” brought it under the Act’s provisions, that the Heart of Atlanta Motel “refused to provide lodging for transient Negroes because of their race or color,” and that the motel owner intended “to continue that policy unless restrained” (p. 249). The Federal Government, on the other hand, provided witnesses and depositions that proved the Heart of Atlanta Motel had refused “to accept Negro transients after the passage of the Act” (p. 244).

Accordingly a three-judge panel of the federal Northern Georgia District Court

sustained the validity of the Act and issued a permanent injunction on [the Federal Government’s] counterclaim restraining [the Heart of Atlanta Motel] from continuing to violate the Act which remains in effect on order of Mr. Justice Black, 85 S.Ct. 1. (p. 243)

Whereupon the Heart of Atlanta Motel owner filed an appeal, which was granted by the U.S. Supreme Court.

*Legal questions.*

Does Title II of the 1964 Civil Rights Act represent a valid constitutional exercise “of Congress’ power under the Commerce Clause as applied to a place of public accommodation serving interstate travelers” (p. 241)? Does the “prohibition in Title II of racial discrimination in public accommodations affecting commerce ... violate the Fifth Amendment as being a deprivation of property or liberty without due process of law” (pp. 241-242)? Does the prohibition of racial discrimination in Title II of the 1964 Civil Rights Act “violate the Thirteenth Amendment as being ‘involuntary servitude’” (p. 242)?

*Legal reasoning of opposing parties.*

Archibald Cox, Solicitor General of the United States, “argued the cause for the United States” (see Appendix N) while “Moreton Rolleston, Jr., argued the cause” for the Heart of Atlanta Motel owner (p. 242). The motel owner’s legal counsel argued that Congress exceeded its authority to regulate commerce under the Commerce Clause contained in Article I, § 8, cl. 3, of the U.S. Constitution. He also put forth the typical Fifth Amendment argument regarding due process. According to legal counsel for the Heart of Atlanta Motel, the motel was “deprived of the right to choose its customers and operate its business as it wishe[d], resulting in a taking of its liberty and property without just compensation” (p. 244). Finally, in a perverse twist of the Thirteenth Amendment’s abolition of slavery and involuntary servitude, Attorney Rolleston advanced a Thirteenth Amendment in support of his client’s suit. According to the argument put forth, the requirement that the Heart of Atlanta Motel “rent available rooms to Negroes against its will, Congress [was] subjecting it to involuntary servitude in contravention of the Thirteenth Amendment” (p. 244).

Solicitor General Cox argued that “the unavailability to Negroes of adequate accommodations interfere[d] significantly with interstate travel, and that Congress, under the

Commerce Clause, ha[d] power to remove such obstructions and restraints. In counterpose to appellant's claim, the Solicitor General argued that the Fifth Amendment did not "forbid reasonable regulation and that consequential damage [did] not constitute a 'taking' within the meaning of that amendment" (p. 244). Finally, regarding the Thirteenth Amendment claim, Solicitor General Archibald Cox declared that such a claim failed

because it [was] entirely frivolous to say that an amendment directed to the abolition of human bondage and the removal of widespread disabilities associated with slavery place[d] discrimination in public accommodations beyond the reach of both federal and state law. (p. 244).

*Holding & Disposition*

The Supreme Court affirmed the decision of the U.S. District Court for the Northern District of Georgia, which upheld the constitutionality of Title II of the Civil Rights Act of 1964 as a valid exercise by Congress of its powers under the Commerce Clause. The Court also held that prohibiting "racial discrimination in public accommodations affecting commerce" did not violate the Fifth Amendment due process provisions nor did such prohibition constitute "involuntary servitude" in violation of the Thirteenth Amendment (p. 241; p. 242).

*Court's rationale.*

Justice Tom Clark delivered the Court's unanimous 9-0 decision. After discussing the facts of the case, the Court examined the congressional history of civil rights legislation, which began with the Civil Rights Act of 1866 followed by the Slave Kidnapping Act, the Peonage Abolition Act of 1967, the Civil Rights Act of 1870, the Anti-Lynching Act of 1871, and the Civil Rights Act of 1875. The Court noted that its decision in the *Civil Rights Cases* "struck down the public accommodations sections of the 1875 Act, after which no civil rights legislation was enacted by Congress until the Civil Rights Act of 1957 (p. 245). An intervening piece of



legislation, the Civil Rights Act of 1960, was enacted prior to the Civil Rights Act of 1964, the Act being challenged by the racist owner of the Heart of Atlanta Motel.

After reviewing the legislative history of the 1964 Act's passage, the Court proceeded to examine the particulars of Title II of the Act embodying the public accommodations requirements. Following this examination, the Court discussed the actual application of the Act's requirements to the operations of the Heart of Atlanta Motel. This scrutiny revealed that the motel owner not only had admitted to violating the 1964 Civil Rights Act, he also had announced his intention "to continue that policy unless restrained" (p. 249). At this point, the Court declared that the only question of importance remaining in the case before it involved "the constitutionality of the Civil Rights Act of 1964 as applied to these facts" (p. 249).

Commencing its examination of the constitutional question before it, the Court stated that the Act's legislative history revealed "that Congress based the Act on § 5 and the Equal Protection Clause [§ 1] of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, § 8, cl. 3, of the Constitution" (p. 249). § 5 of the Fourteenth Amendment stated, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Of course, the relevant portion in § 1 of the Amendment declared, "... nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws." Given the opportunity to examine two constitutional questions, the Court next stated that the "Senate Commerce Committee made it quite clear that the fundamental object of Title II [of the 1964 Civil Rights Act] was to vindicate the 'deprivation of personal dignity that surely accompanies denials of equal access to public establishments,'" and furthermore, that such a purpose "could be readily achieved by 'congressional action based on the commerce power of the Constitution'" (p. 250). The commerce power of the federal government, as set forth in

Article I, § 8, clause 3 of the Constitution, declared, “The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” In light of this evidence, the Court concluded “that since the commerce power is sufficient for our decision here we have considered it alone” (p. 250). Given the choice of the Fourteenth Amendment or the Commerce Clause, the Court’s decision to rely upon the commerce power helped the Court confront a major precedent regarding the issue of public accommodations.

Proceeding next to relevant case law in its examination of the constitutional issues, the Court analyzed the *Civil Rights Cases*, 109 U.S. 3 (1883), which represented the landmark Court decision for the current Court because it had declared unconstitutional the public accommodations provisions of the 1875 Civil Rights Acts.<sup>74</sup> In confronting this precedent, the Court declared that the *Civil Rights Cases* decision was “inapposite, and without precedential value in determining the constitutionality of the present Act” (p. 250). The Court explained its reasoning by noting that the 1875 Civil Rights Act “was not ‘conceived’ in terms of the commerce power,” a fact that was “specifically” noted by the nineteenth century Court (p. 251). The 1964 Civil Rights Act, however, relied upon the commerce power of Congress. As the current Court pointed out, “In contrast, the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved” (pp. 250-251). An additional distinction between the two civil rights actions of Congress lay in the changed nature of commerce between the two time periods. Drawing attention to the changed circumstances between 1875 and 1964, while at the same time pointing out that the legal principles to be applied by the Justices remained the same, the Court stated:

Our populace had not reached its present mobility, nor were facilities, goods and services circulating as readily in interstate commerce as they are today. Although the principles which we apply today are those first formulated by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1 (1824), the conditions of transportation and commerce have changed dramatically, and we must apply those principles to the present state of commerce. (p. 251)

Announcing the determination of its reasoning, the Court reiterated its prior finding, “We, therefore, conclude that the *Civil Rights Cases* have no relevance to the basis of decision here where the Act explicitly relies upon the commerce power...” (p. 252).

Continuing its analysis of the constitutional issues, the Court moved next to an examination of the basis for congressional action. Noting that the “Act as adopted carried no congressional findings,” the Court stated that congressional records of the Act’s legislative proceedings were “replete with evidence of the burdens that discrimination by race or color place[d] upon interstate commerce” (p. 252). According to extensive testimony in the Senate Commerce Committee Hearings, “These exclusionary practices were found to be nationwide” (p. 253). The Under Secretary of Commerce testified “that there [was] ‘no question that this discrimination in the North still exists to a large degree’ and in the West and Midwest as well” (p. 253). Discrimination in public accommodations occurred outside the South despite the fact that “[t]hirty-two States [had] on their books either by statute or executive order” public accommodation requirements regarding discrimination that had been enacted by state legislatures or promulgated by the governor (p. 259).<sup>75</sup> According to the Court, “[T]here was evidence that ... racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community” (p. 253). In a communication to the Chairman of the Senate Commerce Committee, the Administrator of the Federal Aviation Agency wrote “that it was his ‘belief that air commerce [was] adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations” (p. 253). The Court

concluded that “voluminous testimony present[ed] overwhelming evidence that discrimination by hotels and motels impede[d] interstate travel” (p. 253).

Concluding that Congress had abundant evidence for its action, the Court next turned its attention to an examination of congressional power “to deal with these obstructions” under the Commerce Clause (p. 253). Beginning with its first enunciation “140 years ago by the great Chief Justice John Marshall in *Gibbons v. Ogden*,” the Court presented seven paragraphs of Marshall’s interpretation of the Commerce Clause and concluded (pp. 253-254):

In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is “commerce which concerns more States than one” and has a real and substantial relation to the national interest. (p. 255)

The Court next proceeded to cite case law defining commerce as including: a) “the movement of persons through more States than one;” b) “the transportation of persons and property;” and c) “transportation” that was not “commercial in character” (pp. 255-256; p. 256; p. 256). The unanimous Court opinion then cited fourteen different subject matters (and the corresponding Court decision upholding each action’s constitutionality) in which Congress had “extend[ed] the exercise of its power [under the Commerce Clause]” (p. 257). Addressing the criticism that the law represented legislation on a moral issue, not commerce, the Court opined, “But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse” (p. 257). The Court continued by noting that Congress had a rational, as well as a constitutional, basis for enacting Title II of the 1964 Civil Rights Act:

It was this burden which empowered Congress to enact appropriate legislation, and given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong. (p. 257)

Responding to the argument that the Heart of Atlanta Motel's operation was "of a purely local character," the Court reasoned, "But, assuming this to be true, '[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'

*United States v. Women's Sportswear Mfrs. Assn.*, 336 U.S. 460, 464 (1949)" (p. 258). The opinion then cited a portion of the Court's ruling in *United States v. Darby*, 312 U.S. 100, 118 (1941), which was a paraphrase of Justice Marshall's opinion in *McCulloch v. Maryland* (1819), which, in turn, was a paraphrase of Alexander Hamilton's opinion (1791) submitted to President Washington regarding the constitutionality of his proposed economic measures:<sup>76</sup>

The power of Congress over interstate commerce ... extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. (p. 258)

The Court concluded, "One need only examine the evidence which we have discussed above to see that Congress may – as it has – prohibit racial discrimination by motels serving travelers, however 'local' their operations may appear" (p. 258).

Although the Court had already addressed the issues of a rational basis for congressional action and the reasonableness of the means selected by Congress, the Court chose to re-emphasize both issues when it addressed the Fifth Amendment arguments put forth by the Heart of Atlanta Motel. Besides the re-emphasis, this approach allowed the Court to bring more case law to the specific issues raised by the Fifth Amendment argument, thus obliquely addressing Fourteenth Amendment issues that the Court had earlier in this opinion chosen not to deal with directly.

First, in addressing the Fifth Amendment argument, the Court revisited the rational basis issues. Since the commerce power of Congress was both "a specific and plenary" power

“authorized by the Constitution itself,” the Civil Rights Act of 1964 did not “deprive appellant of liberty or property under the Fifth Amendment” (p. 258). Instead of a Fifth Amendment question, the “only questions” pertaining to the legitimacy of the Act were:

1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and 2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no “right” to select its guests as it sees fit, free from governmental regulation. (pp. 258-259)

The Court here noted that legislation regarding public accommodations represented “nothing novel” since “32 States now have such provisions and no case has been cited to us where the attack on a state statute has been successful, either in federal or state courts” (p. 259; p. 260; see also note #73 of this paper). Furthermore, the Court noted, “Some of these Acts go back fourscore years” (p. 259).

Next the Court examined case law regarding public accommodations requirements and Fifth Amendment loss of liberty claims. According to the Court:

[I]n a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty. See *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953), and cases there cited, where we concluded that Congress had delegated law-making power to the District of Columbia “as broad as the police power of a state” which included the power to adopt “a law prohibiting discriminations against Negroes by the owners and managers of restaurants in the District of Columbia.” (For the “long line of cases,” see Appendix O) (pp. 260-261)

Although the Court didn’t mention it, the “long line of cases” to which it referred occurred, with one notable exception, after *Plessy v. Ferguson* (for further information regarding the “long line of cases,” see Appendix O). Regarding allegations of the Act’s infringement of Fifth Amendment due process requirements, the Court, citing its decisions in 1870, 1923, and 1958,

declared, “Neither do we find any merit in the claim that the Act is a taking of property without just compensation. The cases are to the contrary” (p. 261).

Completing its constitutional analysis, the Court dismissed the “involuntary servitude” argument as containing “no merit” (p. 261). It did so, however, in a unique manner which linked the laws in 32 states prohibiting “racial discrimination in public accommodations” with the English common law, which became rooted in this country during colonial times. Referring to the state laws, the Court noted, “These laws but codify the common-law innkeeper rule which long predated the Thirteenth Amendment. It is difficult to believe that the Amendment was intended to abrogate this principle” (p. 261). The Court announced its ruling in the case:

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. (p. 261)

The Court closed with a reminder that policy questions rested “entirely with the Congress not with the courts” (p. 261). In removing obstructions to commerce, “what means are to be employed” is a matter that “is within the sound and exclusive discretion of the Congress” (p. 262). In affirming the decision by the U.S. District Court for Northern Georgia in *Heart of Atlanta Motel v. United States*, the Court described the judiciary’s role:

[The choice of means by Congress] is subject only to one caveat – that the means chosen by it must be reasonable adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

*Concurring/dissenting opinions.*

The unanimous 9-0 decision of the Court in *Heart of Atlanta Motel v. United States* meant there were no dissenting opinions. There were, however, two concurring opinions, which, in effect, concurred with each other. While agreeing with the Commerce Clause grounds of the

ruling, both Justice Black and Justice Douglas thought the Court should have also ruled on the Fourteenth Amendment issues. In Justice Black's opinion, the Civil War Amendments, acting in tandem with the Commerce Clause, provided an unassailable legitimacy for the Act's prohibition of discrimination in public accommodations. After discussing the "legitimate end" of the 1964 Civil Rights Act under the Commerce Clause, Justice Black stated:

In view of the Thirteenth, Fourteenth and Fifteenth Amendments, it is not possible to deny that the aim of protecting Negroes from discrimination is also a legitimate end. The means adopted to achieve these ends are also appropriate, plainly adopted to achieve them and not prohibited by the Constitution but consistent with both its letter and spirit. (pp. 276-277)

Justice Douglas, on the other hand, wanted the Court's opinion to rest squarely on the Fourteenth Amendment. He explained his thinking by partially quoting from his own dissenting opinion in *Edwards v. California*, 314 U.S. 160, 177. After stating his reluctance "to rest solely on the Commerce Clause," Justice Douglas declared:

My reluctance is not due to any conviction that Congress lacks power to regulate commerce in the interests of human rights. It is rather my belief that the right of people to be free of state action that discriminates against them because of race ... "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines." (p. 279)

Specifically, Justice Douglas preferred to place the constitutional basis for the Court's decision on the Enforcement Clause of the Fourteenth Amendment, which is contained in § 5 of the Amendment and states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article" (p. 280). Justice Douglas explained the effects flowing from such a decision.

A decision based on the Fourteenth Amendment would have a more settling effect, making unnecessary litigation over whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler. Under my construction, the Act would apply to all customers in all the enumerated places of public



accommodation. *And that construction would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American history.* (Emphasis added) (p. 280)

And so, Justice Douglas spent the remainder of his concurring opinion illustrating what a Court decision resting on the Fourteenth Amendment would look like. Because of the Court's use of common law to help support state legislation prohibiting discrimination in public accommodations, Justice Douglas' opinion provides particular interest. According to Douglas, the Senate demonstrated the connection not only between English common law and the Fourteenth Amendment, but also between property rights and human liberty. Justice Douglas quoted an extensive section from the Senate Report (S.Rep. No. 872, 88th Cong., 2d Sess., pp. 22-23) to illustrate both the legal and rational basis for the 1964 Civil Rights Act's prohibitions of discrimination in the nation's public accommodations. First, Douglas presented the question posed by the Senate Report and its immediate answer.

Does the owner of private property devoted to use as a public establishment enjoy a property right to refuse to deal with any member of the public because of that member's race, religion, or national origin? As noted previously, the English common law answered this question in the negative. (p. 284)

Next, the reasoning:

It [the English common law] reasoned that one who employed his private property for purposes of commercial gain by offering goods or services to the public must stick to his bargain. It is to be remembered that the right of the private property owner to serve or sell to whom he pleased was never claimed when laws were enacted prohibiting the private property owner from dealing with persons of a particular race. Nor were such laws ever struck down as an infringement upon this supposed right of the property owner. (pp. 284-285)

And then, the Senate Report connected property rights to individual freedom by showing that the purpose of property rights was to protect human liberty.

But there are stronger and more persuasive reasons for not allowing concepts of private property to defeat public accommodations legislation. The institution of private property exists for the purpose of enhancing the individual freedom and liberty of human beings. This institution assures that the individual need not be at the mercy of others, including government, in order to earn a livelihood and prosper from his individual efforts. Private property provides the individual with something of value that will serve him well in obtaining what he desires or requires in his daily life. (p. 285)

So, if property rights protected individual liberties, can property rights provide the basis for denying equality to others differently situated? As can be seen in the following, the Senate Report both asked and answered this question.

Is this time honored means to freedom and liberty now to be twisted so as to defeat individual freedom and liberty? Certainly denial of a right to discriminate or segregate by race or religion would not weaken the attributes of private property that make it an effective means of obtaining individual freedom. (p. 285)

Furthermore, according to the Senate Report, property rights must be kept in the service of the rights of the individual and the liberty of the community.

In fact, in order to assure that the institution of private property serves the end of individual freedom and liberty it has been restricted in many instances. The most striking example of this is the abolition of slavery.... There is not any question that ordinary zoning laws place far greater restrictions upon the rights of private property owners than would public accommodations legislation. (pp. 285-286)

After describing in detail the restrictions of zoning laws, the Senate Report surmised, "Surely the presence of such restrictions does not detract from the role of private property in securing individual liberty and freedom" (p. 286). And then, the Senate Report severed discrimination from private property rights because it violated the purpose of property, that of ensuring individual rights and community liberty; furthermore, such discrimination violated America's national purpose:

Nor can it be reasonable argued that racial or religious discrimination is a vital factor in the ability of private property to constitute an effective vehicle

for assuring personal freedom. The pledge of this Nation is to secure freedom for every individual; that pledge will be furthered by elimination of such practices. (p. 286)

Thus, Justice Douglas concluded that while “Congress in fashioning the present Act used the Commerce Clause to regulate racial segregation, it also used (an properly so) some of its power under § 5 of the Fourteenth Amendment” (p. 286). In closing his concurring opinion, Justice Douglas argued that, in this case, the Fourteenth Amendment protected human liberty, both more effectively and efficiently, than did the Commerce Clause.

I repeat what I said earlier, that our decision should be based on the Fourteenth Amendment, thereby putting an end to all obstructionist strategies and allowing every person – whatever his race, creed, or color – to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate.

In Justice Douglas’ view, the Court’s use of the Fourteenth Amendment would also demonstrate that human rights and liberties possessed, in this particular instance and at this particular time, a higher priority than did the movement of commerce across state lines.

**The commerce clause versus the tenth amendment – Congressional delegation to regulatory bureaucracies.**

*Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940).*

*Facts & procedural history.*

Although this case didn’t specifically raise the issue of the Tenth Amendment, it presented a pragmatic, state rights type of defense against increased federal power.<sup>77</sup> The pragmatism arose from the success of other challenges to increased federal authority that focused on the issue of legislation as an improper delegation of legislative authority to nonlegislative entities. The first time that the Court invalidated an Act of Congress because the legislation represented an “unconstitutional delegation of legislative power” occurred in *Panama Refining Co. v. Ryan* in 1935 (Hall, 1992, p. 619). In this ruling the Court invalidated the provisions of

the National Industrial Recovery Act governing the oil industry. According to one historian, “[T]he administration paid the price for its sloppy procedures in delegating powers...” (Leuchtenburg, p. 144).

Four months later the Supreme Court delivered the *coup de grace* to the remaining portions of the National Industrial Recovery Act in *Schechter Poultry Corp. v. United States* (1935). This unanimous 9-0 decision rested on both an invalid extension of the Commerce Power into intrastate commerce and on an improper delegation of legislative power. “The NIRA’s sweeping delegation of legislative power, declared Justice Cardozo, was ‘delegation running riot’” (Leuchtenburg, p. 145).

Ten months later the Court invalidated the Bituminous Coal Act of 1935 in *Carter v. Carter Coal Co.* (1936).<sup>78</sup> Although the *Carter* decision was a narrow 5-4 decision, the Court rested part of its decision on the “Commerce Clause and the Tenth Amendment work[ing] in tandem to define the appropriate spheres of state and federal governments” (Hall, 1992, p. 128). The Court also ruled that the Bituminous Coal Act constituted a delegation of powers “in its most obnoxious form, for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and are adverse to the interests of others in the same business” (Hall, 1992, p. 224).

In the space of fifteen months, three Court rulings had invalidated portions of New Deal legislation on the grounds that the acts each represented an improper delegation of authority by Congress. So, it was not surprising to find that same argument being used against the federal government in *Sunshine Anthracite Coal Co. v. Adkins*. The decision in *Carter v. Carter Coal Co.*, however, represented the high water mark of the improper delegation of authority argument as no subsequent congressional legislation was invalidated on that ground. One positive

outcome emerged from the decisions, however. “As a result of well-founded criticism of administrator-made law, the government launched the *Federal Register*, which printed federal orders with the force of law” (Leuchtenburg, p. 144, n. 5). Another positive outcome was the greater care taken by Congress in drafting future laws so they would pass judicial muster. As a constitutional scholar noted, “Invalid delegation is spoken of as a constitutional question, but it is more likely to be used as a standard of statutory construction than one of constitutional validity” (Hall, 1992, p. 225). The truth of this observation was verified by the *Sunshine Anthracite Coal* case (See succeeding pp. 643-646).

After *Carter v. Carter Coal Co.* invalidated the Bituminous Coal Act of 1935 (also known as the Guffey-Snyder Act), Congress passed the Bituminous Coal Act of 1937 (a.k.a. the Guffey-Vinson Act), “which re-enacted the original Guffey law, save for the wages and hours provisions, to which the Court had taken exception” (Leuchtenburg, p. 162). The Bituminous Coal Act of 1937 was also more carefully drafted, the authors taking cognizance of the Court’s criticisms of previous legislation that had improperly delegated legislative authority (See “Court’s Rationale” section of this case analysis). The Act established the National Bituminous Coal Commission to regulate the sale and distribution of bituminous coal in order to stabilize the coal industry “through price-fixing and the elimination of unfair competition” (p. 388). Coal producers who accepted membership were to be organized under the Bituminous Coal Code. “The sale, delivery, or offer for sale of coal below the minimum or above the maximum prices established by the Commission [was] made a violation of the code” (p. 388). Section 3 (b) of the Act imposed a 19 1/2% tax on all sales of bituminous coal, based on either the sales price or the fair market value; however, code members were exempt from the tax. § 17 (b) of the Act provided a definition of bituminous coal. The Act provided procedures for obtaining exemptions

from the Bituminous Coal Commission, which “after notice and opportunity for hearing,” either granted or denied the request based on facts and evidence (p. 390). According to the Court’s explanation of the Act, “The findings of the Commission as to the facts, if supported by substantial evidence, [were] conclusive” (p. 390). The Bituminous Coal Act of 1937 also provided an appeal process to the Commission’s decisions through “the Court of Appeals in the circuit where [the aggrieved party] resides or has his principal place of business” (p. 390).

The owner of Sunshine Anthracite Coal Company leased coal lands in Arkansas, from which his company mined and shipped coal. Neither subscribing to nor accepting the provisions of the Bituminous Coal Code contained in the Act, Sunshine Anthracite Coal Company “filed an application for exemption on the grounds that its coal was not bituminous coal as defined [by] ... the Act” (p. 390). The National Bituminous Coal Commission created by the Act “held a public hearing on that application” in which the “[a]ppellant appeared, introduced evidence, and was heard on oral argument” (p. 390). While the hearing was held in October 1937, the Commission didn’t deliver its opinion “with findings of fact and conclusions of law” until August 1938 (p. 390). The Commission’s opinion denied Sunshine Anthracite Coal Company’s “application for exemption on the grounds that its coal was bituminous within the meaning of [the Act]” (pp. 390-391). Subsequently, the coal company filed and was granted a review of the Coal Commission’s decision with the Eighth Circuit Court of Appeals, as provided for by the Act. The Eighth Circuit Court “held that the Commission had jurisdiction to determine the status of coal claimed to be exempt and that the Commission’s decision was based on substantial evidence,” and thus affirmed the National Bituminous Coal Commission’s order in *Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission*, 105 F. 2d 559 (P. 391). Upon appeal, the Supreme Court “denied certiorari,” 308 U.S. 604 (p. 391).

While the above action was still in progress, the U.S. Internal Revenue Service insisted that Sunshine Anthracite Coal Company “pay the taxes, penalties and interest accruing under ... the Act for the period ending February 1938” (p. 391). This demand, accompanied by “a notice of tax lien against [Sunshine Anthracite Coal Company’s] property,” was put forth in May 1938, which was after the hearing, but before the National Bituminous Coal Commission had issued its opinion and, of course, previous to the ensuing step, formal legal action in the form of an appeal of the Commission’s determination to the Eighth Circuit Court of Appeals, i.e., *Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission* (p. 391). In response, the coal company filed action against Adkins, the Internal Revenue Service collector, in the District Court of the United States for the Eastern District of Arkansas “to enjoin the collection of the tax” (p. 391). A three-judge panel “issued a temporary injunction,” after which no further action was taken until the Eighth Circuit Court of Appeals issued its decision in *Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission*.

Following the Circuit Court’s decision, the Internal Revenue Service filed “a supplemental answer stating that the decision in that case was *res judicata* as to the status of appellant’s coal under the Act and that the district court had no jurisdiction over that subject matter” (p. 391). In *Sunshine Anthracite Coal Co. v. Adkins*, the federal Eastern District Court of Arkansas ruled that the Bituminous Coal Act of 1937 was constitutional and “dismissed the bill on the merits” (p. 391). Aware that Sunshine Anthracite Coal Company had appealed the Eighth Circuit Court’s ruling, the U.S. District Court for Eastern Arkansas granted “a permanent injunction against collection of taxes prior to December 4, 1939 the date on which [the Supreme Court] denied a petition for rehearing on the petition for certiorari” (p. 391, n. 8). Subsequently, following the Court’s denial of certiorari in *Sunshine Anthracite Coal Co. v. National*

*Bituminous Coal Commission*, the U.S. Eastern Arkansas District Court “granted a stay with respect to collection to taxes accruing after December 4, 1939, pending final disposition of [the] appeal” in *Sunshine Anthracite Coal Co. v. Adkins* (p. 391, n. 8). After the Supreme Court granted the coal company’s appeal of the district court’s decision, the case was argued April 29, 1940, and decided on May 20, 1940 (p. 381).

*Legal questions.*

Are the regulatory provisions, including price-fixing, of the Bituminous Coal Act of 1937 “a valid exercise of the federal commerce power” (p. 384)? Do the price-fixing provisions of the Act violate the due process requirements of the Fifth Amendment? Do the provisions of the Act giving regulatory powers to the National Bituminous Coal Commission constitute “an invalid delegation of legislative power” (p. 382)? Do the provisions of the Act empowering the Commission to determine “whether a particular coal producer falls within its provisions” constitute an “invalid delegation of judicial power to the Commission” (p. 382)?

*Legal reasoning of opposing parties.*

As previously mentioned, the attack on the Bituminous Coal Act’s legitimacy combined the recently successful arguments regarding unconstitutional delegations of power as well as the older component of previous arguments regarding the Fifth Amendment. Attorneys for the Sunshine Anthracite Coal Company argued that the Act’s delegation of power to the Bituminous Coal Commission “to determine the object to which the law [was] to be applied” represented “an unconstitutional delegation of legislative power” (p. 383). According to the coal company’s attorneys, “Construction of the Act as to the meaning of ‘bituminous, semi-bituminous and sub-bituminous’ [was] a judicial function and [could] not be delegated to an administrative tribunal”



(p. 383). The Act's delegation of authority to the Commission to make that determination of meaning constituted "an unlawful delegation of judicial power" (p. 383).

Furthermore, the division of coal producers "into artificial classes of code and non-code for regulatory purposes [was] unreasonable and arbitrary, and violate[d] the Fifth Amendment" (p. 384). The coal company's attorneys again attacked the Act's classification scheme as violating Fifth Amendment requirements, this time through criticism of the 19 1/2% tax. According to attorneys, "The so-called 19 1/2% tax on sale price of coal [was] not a tax, but a confiscatory penalty assessed without fault on the part of the appellant" (p. 384). Since the application of the "so-called tax" was based not upon "difference in either conduct or product, but solely upon membership in the code," the assessment was "unreasonable and arbitrary, and not in any wise a proper method of accomplishing a proper congressional purpose, and violate[d] the Fifth Amendment" (p. 384).

The government's highest official legal talent presented arguments in defense of the Bituminous Coal Act of 1937. Besides including the Solicitor General, the Attorney General, and the Assistant Attorney General, the government team also featured a rising young attorney described as a "protégé" of Justice William O. Douglas, Abe Fortas (Hall, 1992, p. 308).<sup>79</sup> The team of government attorneys argued that the Act did constitute "a valid exercise of the federal commerce power" because the Act's regulatory provisions applied "only to sales in or directly affecting interstate commerce" (p. 384). The Act's price-fixing provisions were substantially "the same as those contained in the ... Act of 1935, which the dissenting opinions in *Carter v. Carter Coal Co.* indicated "were valid" and must be considered controlling as the "majority of the Court ... did not pass upon the validity of these provisions" (p. 384). Furthermore, according to the government's attorneys, the Act's fixing of prices did "not violate the due process clause"

of the Fifth Amendment because “the burden of proving that the regulation [was] arbitrary or capricious and of overcoming the presumption of constitutionality” was “upon the person assailing the validity of the statute,” a burden that was not “sustained by appellant here” (p. 385). Moreover, the attorneys continued, “both the record in this case and facts subject to the Court’s notice demonstrate[d] that the regulatory provisions [were] not arbitrary, capricious, or unreasonable” (p. 385).

Government attorneys countered the argument that the Act improperly delegated legislative power to the Bituminous Coal Commission by pointing out that “[t]he definition of ‘bituminous coal’ in § 17 (b) constitute[d] a satisfactory standard;” therefore, the coal company’s argument was “without substance” (p. 385). Neither did the Act constitute “an invalid delegation of judicial power” by granting the Bituminous Coal Commission authority “to determine the question of fact as to the status of coal under the Act” because the Act provided for the Commission’s “decision [to be] reviewable by the courts” (p. 385). Finally, according to the government’s attorneys, it didn’t matter whether the 19 1/2% tax was “a tax or a penalty” because it was “aimed to effectuate ... a legitimate exercise of the commerce power” (p. 386). As stated by the government attorneys, “There can be no question of the power of Congress to impose penalties in order to enforce laws enacted under any of the enumerated powers” (p. 386). They continued, “If the tax be a penalty, there can be no improper classification in applying it only to those who fail to comply with the regulatory plan which it is designed to enforce” (p. 386). As such, “the differentiation between code members and non-code members [was] valid” because it was “a means of equalizing the burdens imposed upon the two groups” (p. 386).

As can be seen from the preceding, the arguments presented a somewhat complex picture of the issues in that many of the facts of the case were each addressed by multiple points of law.

To illustrate, consider the following discussion depicting groupings of the facts with their multiple legal arguments. Regarding the 19 1/2% tax, two legal arguments were presented: 1) it was not a tax, but a confiscatory penalty; 2) the 19 1/2% tax, based upon an improper classification scheme of code & noncode coal producers, violated the Fifth Amendment.

Regarding the issue of the Act's regulation of coal prices, two legal arguments were presented:

1) such regulation exceeds the commerce powers of Congress; 2) the regulation of coal prices violates the due process requirements of the Fifth Amendment. Regarding the issue of the Act's constituting an improper delegation of powers by Congress, two legal arguments were presented.

The first argument involved yet another complication in that, besides addressing the improper delegation of power issue, it also addressed the preceding issue, regulating prices. The two arguments that addressed the improper delegation of powers by Congress were: 1) the regulation of coal prices by the Coal Commission constituted an improper delegation of legislative authority; 2) the determination by the Coal Commission of what was bituminous coal and what was nonbituminous coal constituted an improper delegation of judicial authority. The Court began its opinion by addressing the 19 1/2% tax versus confiscatory penalty contention; it concluded its opinion by addressing the Fifth Amendment arguments concerning the 19 1/2% tax. The Court addressed the remaining issues in the portions of the opinion intermediary to the 19 1/2% tax arguments.

*Holding & disposition.*

According to the Court, the constitutionality of the Bituminous Coal Conservation Act of 1937 was:

*upheld* over the contentions that the 19 1/2% tax [was] not a tax but a penalty; that Congress lack[ed] power to fix minimum prices for bituminous coal sold in interstate commerce; that there ha[d] been an invalid delegation

of legislative and judicial power; and that the division of bituminous coal into code and non-code classes [was] improper. (p. 381)

More specifically, the “standards specified by ... the Bituminous Coal Act to control the Commission” and the “definition[s] of bituminous coal [were] adequate as a standard for the Commission’s action in determining what coal [was] subject to the Act” passed judicial muster in terms of providing adequate guidance to an administrative agency “for carrying out the general policy and purpose of the Act” (pp. 382, 398). Finally, the Act’s provisions for judicial review of its actions provided due process for the Sunshine Anthracite Coal Company (pp. 382, 400).

*Court’s rationale.*

Justice William O. Douglas, a former professor from Columbia and Yale Law Schools and former chairman (1937) of the SEC who had been appointed by President Roosevelt to fill the seat left vacant by Justice Brandeis’ retirement from the Court in 1939, delivered the Court’s 8-1 decision (See Hall, 1992, p. 233). After reviewing the facts of the case, Justice Douglas addressed the questions surrounding the 19 1/2% tax provisions of the Act. According to the Court, “[I]t seems plain that the tax was intended to apply only to those *sales* by non-code members which ‘would be’ subject to *regulation* under § 4” (Emphasis in original) (p. 392). If the Court did as the coal company wished, the Court reasoned, “The essential sanction of the Act would then disappear and its effectiveness would be seriously impaired” (p. 392). The Court continued, “To sustain appellant’s position ..., we would have to override the express Congressional plan to make the 19 1/2% tax ‘in aid of the regulation of interstate commerce’ in bituminous coal” (pp. 392-393). “Such a task,” the Court concluded, “is not for the courts” (p. 393). The Court re-stated that the “purpose and effect” of the 19 1/2% tax was not “merely for

revenue purposes,” but was “primarily a sanction to enforce the regulatory provisions of the Act” (p. 393). According to the Court, such a purpose was legitimate:

Congress may impose penalties in aid of the exercise of any of its enumerated powers. The power of taxation, granted to Congress by the Constitution, may be utilized as a sanction for the exercise of another power which is granted it. (p. 393)

Addressing the question whether or not the regulatory provisions of the Bituminous Coal Conservation Act of 1937 exceeded Congress’ powers under the Commerce Clause, the Court stated, “The regulatory provisions are clearly within the power of Congress under the commerce clause of the Constitution” (p. 393). As the government attorneys had urged this position by citing the dissenting opinions of *Carter v. Carter Coal Co.*, so the Court decided, observing:

As stated by Mr. Justice Cardozo in his dissent in *Carter v. Carter Coal Co.*, *supra*, p. 326, “To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences.” (pp. 393-394)

The Court continued:

Since this power when it exists is complete in itself, *Gibbons v. Ogden*, 9 Wheat. 1, 196, there can be no question but that the provisions of this Act are an exertion of the paramount federal power over interstate commerce. (p. 394).

Next, the Court addressed the Fifth Amendment arguments regarding the price-fixing provisions of the Bituminous Coal Conservation Act of 1937. The Court began, “Nor does the Act violate the Fifth Amendment” (p. 394). According to the Court, “Price control is one of the means available to the states ... and to the Congress ... in their respective domains ... for the protection and promotion of the welfare of the economy” (p. 394). The claims made by attorneys for the Sunshine Anthracite Coal Company, e.g., “that the ills of the industry are attributable to overproduction; that the increase of prices will cause a further loss of markets and add to the afflictions which beset the industry,” are, in the Court’s view, “matters [that] relate to

questions of policy, to the wisdom of the legislation, and to the appropriateness of the remedy chosen – matters that are not our concern” (p. 394). According to the Court evaluation of the situation, “If we endeavored to appraise them [the questions of the wisdom of Congress’ policy choices] we would be trespassing on the legislative domain” (p. 394). Without mentioning the term, rational basis, the Court proceeded to examine the underlying record providing evidence of the rational basis for congressional passage of the Bituminous Coal Act, which included another citation from Justice Cardozo’s dissent in *Carter v. Carter Coal Co.*

The investigations preceding the 1935 and 1937 Acts are replete with an exposition of the conditions which have beset that industry. Official and private records give eloquent testimony to the statement of Mr. Justice Cardozo in the *Carter* case (p. 330) that free competition had been “degraded into anarchy” in the bituminous coal industry. (p. 395)

The Court examined the conclusions drawn by Congress regarding the nation’s coal industry.

It was the judgment of Congress that price-fixing and the elimination of unfair competitive practices were appropriate methods for prevention of the financial ruin, low wages, poor working conditions, strikes, and disruption of the channels of trade which followed in the wake of the demoralized price structures in this country. (p. 395)

Evaluating the justifications used by Congress to justify its enactment of the Act, the Court declared, “If the strategic character of this industry in our economy and the chaotic conditions which have prevailed in it do not justify legislation, it is difficult to imagine what would” (p. 395). In response to the implied question, “What would it take for the Court to declare the Act unconstitutional,” the Court replied:

To invalidate this Act we would have to deny the existence of power on the part of Congress under the commerce clause to deal directly and specifically with those forces which in its judgment should not be permitted to dislocate an important segment of our economy and to disrupt and burden interstate channels of trade. (pp. 395-396)

The Court concluded, “That step could not be taken without plain disregard of the Constitution”

(p. 396). According to the Court’s interpretation of congressional power under the Constitution,

Congress under the commerce clause is not impotent to deal with what it may consider to be dire consequences of laissez-faire. It is not powerless to take steps in mitigation of what in its judgment are abuses of cut-throat competition. And it is not limited in its choice between unrestrained self-regulation on the one hand and rigid prohibitions on the other. (p. 396)

And, in illustration of the principle that yesterday’s dissent can, with changed conditions, provide the basis for a future majority opinion, the Court announced:

There is nothing in the *Carter* case which stands in the way. The majority of the Court in that case did not pass on the price-fixing features of the earlier Act. The Chief Justice and Mr. Justice Cardozo in separate minority opinions expressed the view that the price-fixing features of the earlier Act were constitutional. We rest on their conclusions for sustaining the present Act. (pp. 396-397)

Having concluded its examination of the coal company attorneys’ due process contentions under the Fifth Amendment, the Court turned next to consideration of the assertions by legal counsel for the Sunshine Anthracite Coal Company that the Bituminous Coal Conservation Act of 1937 was invalid because Congress had improperly delegated governmental powers (both legislative and judicial) to the Bituminous Coal Commission. Addressing the claim of improper delegation of legislative powers by the Act to the Bituminous Coal Commission, the Court declared, “Nor does the Act contain an invalid delegation of legislative power” (p. 397). The Court explained by first noting the Commission’s authority under the Act to establish both maximum and minimum prices “in the public interest” (p. 397). After discussing the Act’s standards for setting maximum prices, the Court devoted 16 lines of its opinion to a listing of the standards to which minimum prices had to “conform” (p. 397). Next the Court made comparisons between “fixing reasonable prices for bituminous coal” under the Bituminous Coal Conservation Act and “fixing rates under the Interstate Commerce Act ... and the Packers and

Stockyards Act” (p. 398). Drawing attention to the fact that the constitutionality of the rate-fixing portions of the two latter Acts had been upheld in previous decisions, the Court next listed the standards which had also been upheld by previous Court rulings: “the standard of ‘just and reasonable’ to guide the administrative body,” “the appropriateness of the criterion of the ‘public interest’ in various contexts,” and “the standard of ‘unreasonable obstruction’” (p. 398).

According to the Court, “[A]ll make it clear that there is a valid delegation of authority in this case” (p. 398). The Court further noted:

The standards which Congress has provided here far exceed in specificity others which have been sustained. Certainly in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act. To require more would be to insist on a degree of exactitude which not only lacks legal necessity but which does not comport with the requirements of the administrative process. (p. 398)

Reminiscent of the arguments regarding the nature of the Constitution (was it a general blueprint or a detailed plan), the Court continued by noting the differing requirements of the two processes, legislating and administering (See preceding pp. 282-283 re: nature of the Constitution).<sup>80</sup>

But the *effectiveness* of both the legislative and administrative processes would become endangered if Congress were under the constitutional compulsion of filling in the details beyond the liberal prescription here. Then the *burdens of minutiae* would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues. (Emphasis added) (p. 398)

Prepared to announce its holding regarding the issue of improper delegation of legislative authority by Congress to the Bituminous Coal Commission, the Court ruled, “For these reasons we hold that the standards with which Congress has supplied the Commission are plainly valid” (pp. 398-399). The Court then addressed the issue of delegating legislative authority to the coal industry by reason of favoring members of the Bituminous Coal Code. According to the Court,



“The members of the code function subordinately to the Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities” (p. 399). “Since law-making is not entrusted to the industry,” the Court declared, “this statutory scheme is unquestionably valid” (p. 399).

Having confronted the issue of improper delegation of legislative authority, the Court turned its attention to the arguments advanced by the coal company attorneys in support of the contention that the Act represented an improper delegation of judicial authority to the Bituminous Coal Commission. Attorneys for Sunshine Anthracite Coal Company had argued that the determination of what was and what was not bituminous coal within the meaning of the Act was “a judicial function” that could not be “delegated to an administrative tribunal” (p. 383). Responding to that argument, the Court declared that Congress could delegate to [an administrative agency] the determination of the question of fact whether a particular coal producer fell within the Act” (p. 400). By way of further explanation, the Court drew a comparison between what the Bituminous Coal Commission was required to do and what the Interstate Commerce Commission had been required to do under the Railway Labor Act, the latter requirement having been upheld by the Court.

The fact that such a determination involved an interpretation of the term “bituminous coal” is of no more significance here than was the fact that in the *Shields* case, a decision by the Interstate Commerce Commission of what constituted an “interurban” electric railway was necessary for the ultimate finding as the applicability of the Railway Labor Act to carriers. (p. 400)

In the Court’s view, the critical issue was not an improper delegation of authority; instead the problem centered on “the adequacy of the standard governing the exercise of the delegated authority” (p. 400). Addressing that issue, the Court provided the Act’s definition of

“bituminous coal,” a definition that occupied seven lines of the Court’s opinion (p. 399). In announcing its opinion of the Act’s definition, the Court stated:

[W]e think the definition of bituminous coal is wholly adequate as a standard for administrative action. The fact that it is not a chemist’s or an engineer’s definition is not fatal. The definition is not devoid of meaning. We are unable to say that it cannot be applied so as to delineate the areas in which Congress intended to make this system of control effective. (p. 399)

And then the Court connected the twin problems of legislating law and administering law.

The fact that many instances may occur where its application may be difficult is merely to emphasize the nature of the administrative problem and the reason for the grant of latitude by the Congress. The difficulty or impossibility of drawing a statutory line is one of the reasons for supplying merely a statutory guide... That guide is sufficiently precise for an intelligent determination of the ultimate questions of fact by experts. (pp. 399-400)

Finally, the Court noted that the Sunshine Anthracite Coal Company had “received all the judicial review to which it [was] entitled” (p. 400). Two actions against the company stemming from activities of the Bituminous Coal Commission had been appealed by the company, not only to the Eighth Circuit Court of Appeals, but also to the nation’s highest judicial tribunal, the U.S. Supreme Court. Accordingly, the Act neither violated due process requirements of the Fifth Amendment nor constituted an “invalid delegation of judicial power” (p. 400).

*Concurring/dissenting opinions.*

Justice McReynolds disagreed with the Court majority, but didn’t offer a separate dissenting opinion. McReynolds believed that the Bituminous Coal Act of 1937 was “beyond any power granted to Congress” and that the district court’s decision should have been “reversed” (p. 404). Other than his belief being summarized by Justice Douglas, no arguments in support of that belief were presented, either by Justice McReynolds or on his behalf.

***American Textile Manufacturers Institute v. Donovan, 452 U.S. 490 (1981).***

*Facts & procedural history.*

Although the record of the Court's decision did not include separate sections detailing the legal arguments presented by both teams of attorneys, Justice Brennan's majority opinion provided sufficient information regarding legal arguments to permit use of the full brief format. The case centered on congressional use of its Commerce Power via an administrative agency, which Congress had empowered to provide for worker health in the nation's various work settings. According to the Court:

In its statement of findings and declaration of purpose encompassed in the Act itself, Congress announced that "personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.... Senator Eagleton summarized: "Whether we, as individuals, are motivated by simple humanity or by simple economics, we can no longer permit profits to be dependent upon an unsafe or unhealthy worksite. (pp. 521-522)

The cotton industry challenged the congressional action as implemented by the Secretary of Labor, the major focus of such implementation being attempts to reduce and eliminate working conditions causing "'brown lung' disease, ... a serious and potentially disabling respiratory disease primarily caused by the inhalation of cotton dust" (p. 495). The legal challenge was quite sophisticated because instead of challenging the constitutionality of either the congressional action or administrative implementation of the act in question, the legal objections centered upon the interpretation of the legislative requirements and upon an attempt to require an elaborate and cumbersome process designed to defeat the actual implementation of the act's provisions.

In 1970 Congress passed the Occupational Safety and Health Act in order "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" (p. 493). The Act required the Secretary of Labor "to establish, after notice and

opportunity to comment, mandatory nationwide standards governing health and safety in the workplace” (p. 493). The Secretary of Labor delegated such authority to the Assistant Secretary for Occupational Safety and Health who was responsible for administering the Occupational Safety and Health Administration, or OSHA. Because the lines of administrative authority converged on the Secretary of Labor, the Court used “the terms OSHA and the Secretary interchangeably [throughout the opinion] when referring to the agency, the Secretary of Labor, or the Assistant Secretary for Occupational Safety and Health” (p. 494, n. 1).

With specific regards to the cotton industry, OSHA

promulgated a standard limiting occupational exposure to cotton dust, an airborne particle byproduct of the preparation and manufacture of cotton products, exposure to which induces a “constellation of respiratory effects” known as “byssinosis.” 43 Fed. Reg. 27352, col. 3 (1978). This disease was one of the expressly recognized health hazards that led to passage of the Act. (p. 494)

“Byssinosis [was] known in its more severe manifestations as ‘brown lung’ disease” (p. 495).

The Act defined cotton dust as:

dust present in the air during the handling or processing of cotton, which may contain a mixture of many substances including ground up plant matter, fiber, bacteria, fungi, soil, pesticides, non-cotton plant matter and other contaminants which may have accumulated with the cotton during the growing, harvesting and subsequent processing or storage periods. (pp. 495-496, n. 6).

The Act defined byssinosis “as a ‘continuum ... disease,’ that has been categorized into four grades” (p. 496). The Court described the Act’s description of both the disease’s least and most serious forms. According to the Court:

In its least serious form, byssinosis produces both subjective symptoms, such as chest tightness, shortness of breath, coughing, and wheezing, and objective indications of loss of pulmonary functions. In its most serious form, byssinosis is a chronic and irreversible obstructive pulmonary disease, clinically similar to chronic bronchitis or emphysema, and can be severely disabling. At worst, ... byssinosis can create an additional strain on

cardiovascular functions and can contribute to death from heart failure. (p. 496)

Regarding the history of the disease, the Court noted, “Byssinosis is not a newly discovered disease, having been described as early as in the 1820’s in England, ... and observed in Belgium in a study of 2,000 cotton workers in 1845...” (p. 497, n. 9, ¶ 6). However, it was not until “the early 1960’s” that byssinosis was “recognized in the United States as a distinct occupational hazard associated with cotton mills” (p. 498). According to the Court’s citation from the Senate Report on the Act, the late date of this recommendation occurred because the cotton industry ignored “repeated warnings over the years from other countries that their cotton workers suffered from lung disease” (p. 499, n. 13). The legislative history of the Act revealed that at the time the Act was being considered, approximately 25% of “active cotton-preparation and yarn-manufacturing workers suffer[ed] at least some form of the disease” while at least 8% of “employed and retired cotton mill workers” suffered “from the most disabling form of byssinosis” or, in other words, from brown-lung disease (p. 498).

The OSHA standard did not represent the government’s first attempt to regulate worker exposure to cotton dust. In 1968, after Congress had passed “the Walsh-Healey Act,” the Secretary of Labor established standards for “airborne contaminant threshold limit values” that were “applicable to public contractors” only (p. 499). The standard used by the Secretary of Labor had been developed two years previously by a private organization, “the American Conference of Governmental Industrial Hygienists (ACGIH),” in 1966 (P. 499). The ACGIH standard, and the Secretary of Labor’s as well, “recommended that exposure to total cotton dust be limited to a ‘threshold limit value’ of 1,000 micrograms per cubic meter of air (1,000  $\mu\text{g}/\text{m}^3$ ) averaged over an 8-hour workday” (p. 499). In 1974, which was four years after the Occupational Safety and Health Act of 1970 was passed and four years before OSHA

promulgated “its final Cotton Dust Standard – the one challenged in the instant case – on June 23, 1978,” ACGIH adopted a different measurement unit resulting in a lower threshold limit (p. 501). Instead of total dust, the unit adopted by ACGIH was “respirable” dust (p. 499). Comparatively speaking, “1,000  $\mu\text{g}/\text{m}^3$  of total dust [was] roughly equivalent to 500  $\mu\text{g}/\text{m}^3$  of respirable dust” (p. 500, n. 17). As a result of changing its unit of measure from total dust to respirable dust in 1974, the new exposure to cotton dust recommendation by the ACGIH was 200  $\mu\text{g}/\text{m}^3$  (pp. 499-500).<sup>81</sup> OSHA, on December 28, 1976, “published a proposal to replace the existing federal standard on cotton dust [1,000  $\mu\text{g}/\text{m}^3$ ] with a new permanent standard ... [which] contained a PEL [permissible exposure limit] of 200  $\mu\text{g}/\text{m}^3$ ” (p. 501). Following three public hearings, which involved “widespread” public participation of “representatives from industry and the work force, scientists, economists, industrial hygienists, and many others.” OSHA modified the originally proposed Cotton Dust Standard [a permissible exposure limit (PEL) of 200  $\mu\text{g}/\text{m}^3$ ] official on June 23, 1978 (p. 501). As officially modified, the originally proposed 200  $\mu\text{g}/\text{m}^3$  PEL requirement applied only to yarn manufacturing. The OSHA Cotton Dust Standard “for slashing and weaving operations” became 750  $\mu\text{g}/\text{m}^3$ , while “for all other processes in the cotton industry,” the standard was set at 500  $\mu\text{g}/\text{m}^3$  (p. 503). Such was the nature of the standard being challenged by the cotton industry and its friends, the American Farm Bureau Federation and the Chamber of Commerce.

Regarding the implementation strategy for meeting the requirements of the Cotton Dust Standard, OSHA “depended primarily on a mix of engineering controls, such as installation of ventilation systems, and work practice controls, such as special floor-sweeping procedures” with full compliance of the PEL’s (permissible exposure limits) being “required within four years” (p. 502). During the four-year compliance period, OSHA also required “employers to provide

respirators to employees” (p. 503). OSHA also required cotton manufacturers to monitor cotton dust exposure, provide “medical surveillance of all employees,” conduct “employee education and training programs,” provide annual medical examinations, and to post warning signs (p. 503). In a specific provision that was also challenged by the cotton manufacturers, OSHA required “employers to transfer employees unable to wear respirators to another position, if available, having a dust level at or below the Standard’s PEL’s, with ‘no loss of earnings or other employment rights or benefits as a result of the transfer’” (p. 503).

The American Textile Manufacturers Institute and the National Cotton Council of America filed separate suits in the Circuit Court of Appeals for the District of Columbia against Donovan, the Secretary of Labor. The suits challenged the validity of the Cotton Dust Standard as well as the requirement “that employers guarantee the wages and benefits of employees who are transferred to other positions because of their inability to wear respirators” (p. 495, n. 5). The Circuit Court “upheld the Standard in all major respects” (p. 504). More specifically, the Circuit Court for the District of Columbia ruled that, contrary to arguments by the cotton industry attorneys, Congress had already conducted a cost-benefits analysis in passing the legislation, that instead of such an analysis, OSHA was charged with developing a health standard that would “protect employees against material health impairment subject only to the limits of technological and economic feasibility” (p. 504). The Circuit Court also “held that OSHA ha[d] such authority” to require that employees be guaranteed their current wages and benefits if forced to request a transfer for health reasons because of an inability to wear a respirator (p. 537). Finally, the Circuit Court “held that the agency’s determination of technological and economic feasibility was supported by substantial evidence in the record as a

whole” (p. 505). The U.S. Supreme Court “granted certiorari, 449 U.S. 817 (1980)” and combined the two suits into one legal case (pp. 495, 491).

*Legal questions.*

Does the Occupational Safety and Health Act require the Secretary of Labor, “in promulgating a standard pursuant to [the Act’s requirements], to determine that the costs of the standard bear a reasonable relationship to its benefits” (p. 506)? Does the determination by the Secretary of Labor regarding the Cotton Dust Standard’s economic feasibility meet the “substantial evidence” requirement of the Act (p. 522)? Did OSHA exceed its “statutory authority when it issued the wage guarantee regulation” (p. 540)?

*Legal reasoning of opposing parties.*

Robert Bork, who later would be nominated for the Supreme Court by President Reagan and rejected by both the Senate Judiciary Committee and the full Senate, headed the legal team for the cotton manufacturers, which consisted of thirteen attorneys in addition to Bork.<sup>82</sup> Of interest to Iowans and other rural Americans, the American Farm Bureau Federation lined up on the side of the cotton manufacturers in opposing the new requirements for reducing the prevalence of “brown lung” disease in the cotton industry and for safeguarding workers’ health (p. 493). The Chamber of Commerce also opposed the new health requirements for the cotton industry. In challenging the validity of the Cotton Dust Standard established by OSHA, the legal team for the cotton industry argued that the Act required “OSHA to demonstrate that its Standard reflect[ed] a reasonable relationship between the costs and benefits associated with the Standard” (p. 494). More specifically, in addition to showing that “a standard addresse[d] a significant risk of material health impairment,” OSHA was also required to “demonstrate that the reduction in risk of material health impairment [was] significant in light of the costs of attaining that



reduction” (p. 506). The cotton industry’s legal team also argued that “OSHA’s determination of the Standard’s ‘economic feasibility’ was not supported by substantial evidence” (p. 491).

Finally, the cotton industry lawyers contended “that the wage guarantee requirement was beyond OSHA’s authority” (p. 491).

The Deputy Solicitor General headed the federal government’s legal team of seven attorneys. The American Federation of Labor and Congress of Industrial Organizations provided separate legal argument to the Court through a team of eight attorneys. Attorneys for the Secretary of Labor and the labor organization argued that OSHA was not required to balance the costs and benefits of its health requirements because Congress had already done that “in the Act itself” (p. 494). The labor attorneys contended that the Act constituted a mandate to OSHA to “enact the most protective standard possible to eliminate a significant risk of material health impairment, subject to the constraints of economic and technological feasibility” (p. 495). Attorneys further argued that not only had OSHA “explained the economic impact it projected for the textile industry,” but also OSHA had “substantial support in the record for its ... findings of economic feasibility for the textile industry” (p. 536). Finally, the government attorneys argued that the wage guarantee requirement was necessary to “minimize any adverse economic impact on the employee by virtue of the inability to wear a respirator” (p. 538). They further argued:

Experience under the Act has shown that employees are reluctant to disclose symptoms of disease and tend to minimize work-related health problems for fear of being discharged or transferred to a lower paying job.... It may reasonably be expected, therefore, that many employees incapable of using respirators would continue to breathe unhealthful air rather than request a transfer, thus destroying the utility of the respirator program. (p. 539)

*Holding & disposition.*

Justice Powell took no part in the proceedings. Justices Brennan, White, Marshall, Blackmun, and Stevens formed the majority. Justice Stewart filed a dissenting opinion as did Justice Rehnquist, which was joined by Chief Justice Burger. The 5-3 Court majority “affirm[ed] in part, and vacate[d] in part,” the Circuit Court ruling (p. 505).

Regarding the first legal question, the Court held that OSHA was not required to develop a cost-benefit analysis before “promulgating a standard” under the Act’s requirements because, instead of such an analysis, the Act required a “feasibility analysis” (p. 509). The Court also held that the Circuit Court had not “‘misapprehended or grossly misapplied’ the substantial evidence test when it found that ‘OSHA reasonably evaluated the cost estimates before it, considered criticisms of each, and selected suitable estimates of compliance costs’” (p. 530). Regarding the third legal question challenging OSHA’s authority under the Act to issue the wage guarantee regulation, the Court held “that OSHA acted beyond statutory authority when it issued the wage guarantee regulation” (p. 540).

*Court’s rationale.*

Justice Brennan delivered the Court’s 5-3 opinion. The figure on the following page portrays the structure of the Court’s opinion, which illustrates its approach to the legal issues and questions (See Figure 3). With regards to the first legal question centering on a cost-benefit versus economic-technological feasibility analysis, the Court noted and ruled:

In effect then, as the Court of Appeals held, Congress itself defined the basic relationship between costs and benefits, by placing the “benefit” of worker health above all other considerations save those making attainment of this “benefit” unachievable. Any standard based on a balancing of costs and benefits ... would be inconsistent with the command set forth in § 6 (b) (5). Thus, cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is. (p. 509)

In support of its analysis and holding, the Court cited testimony by senators and representatives, including the following remarks by Congressman Dent:

Although I am very much disturbed over adding new costs to the operation of our production facilities because of the threats from abroad, I would say there is a greater concern and that must be for the production men who do the producing – the men who work in the service industries and the man and women in this country who daily go out and keep the economy moving and make it safe for all of us to live and to work and to be able to prosper in it. (p. 521, n. 39)

The Court concluded:

Nowhere is there any indication that Congress contemplated a different balancing by OSHA of the benefits of worker health and safety against the costs of achieving them. Indeed Congress thought that the *financial costs* of health and safety problems in the workplace were as large as or larger than the *financial costs* of eliminating these problems. (Emphasis in original) (p. 521)

*Figure 3:  
Structure of the Court's Opinion*

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| <ul style="list-style-type: none"> <li>I. Facts and Legal History of the Case.</li> <li>II. Legal Question and Examination.             <ul style="list-style-type: none"> <li>A. Language of the Statute.</li> <li>B. Plain Meaning of the Language.</li> <li>C. Legislative History of the Act.</li> </ul> </li> <li>III. Examination of OSHA Findings to Determine If They Met the “Substantial Evidence” Test.             <ul style="list-style-type: none"> <li>A. Cost Estimates of Compliance.</li> <li>B. Economic Feasibility of Industry Compliance.</li> </ul> </li> <li>IV. Wage Guarantee Requirements Issue.</li> <li>V. Summary of Ruling.</li> </ul> |
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Addressing the second legal question regarding the cotton industry’s claim that OSHA’s Cotton Dust Standard was not based on substantial evidence, the Court declared that it would

apply the familiar rule that “[t]his Court will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied” by the Court below. *Universal Camera Corp. v. NLRB, supra*, at 491” (p. 523)

Prior to its examination of OSHA's examination of the problem, its findings, and its proposals based on those findings, the Court restated its previous definition of substantial evidence.

In statutes with provisions virtually identical to § 6 (f) of the Act, we have defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera corp. v. NLRB*, 340 U.S. 474, 477 (1951). (pp. 522-523)

After examining "OSHA's findings and the record upon which they were based," the Court announced its position (p. 523). According to the Court, "On the basis of the whole record, we cannot conclude that the Court of Appeals 'misapprehended or grossly misapplied' the substantial evidence test" (p. 536).

Finally, the Court examined the issues surrounding OSHA's promulgation of the wage and benefit guarantee. The Court began its examination by noting that the Cotton Dust Standard placed "heavy reliance on the use of respirators to protect employees from exposure to cotton dust, particularly during the 4-year interim period necessary to install and implement feasible engineering controls" (p. 536). The Court noted that the Act required the Secretary of Labor "to include 'a *statement of the reasons*' for" actions taken to implement the provisions of the Act which "shall be published in the Federal Register" (Emphasis in original) (p. 538). The Court further noted:

But OSHA never explained the wage guarantee provision as an approach designed to contribute to increased health protection. Instead the agency stated that the "goal of this provision is to minimize any adverse economic impact on the employee by virtue of the inability to wear a respirator." [43 Fed. Reg.], at 27387, col. 3 [(1978)]. (pp. 538-539)

The Court further noted the argument used by government attorneys to connect the wage requirement to health:

Experience under the Act has shown that employees are reluctant to disclose symptoms of disease and tend to minimize work-related health problems for

fear of being discharged or transferred to a lower paying job.... It may reasonably be expected, therefore, that many employees incapable of using respirators would continue to breathe unhealthful air rather than request a transfer, thus destroying the utility of the respirator program. (p. 539)

Noting that the argument had “merit,” the Court also noted that it amounted to a “*post hoc* rationalization” that didn’t meet the Act’s requirements (p. 539). Although there was “evidence in the record that might support” the determination made by OSHA in terms of the connection made by government attorneys after the fact, the Court further explained (p. 539):

However, the courts will not be expected to scrutinize the record to uncover and formulate a rationale explaining an action, when the agency in the first instance has failed to articulate such rationale. See *Automotive Parts & Accessories Assn. v. Boyd*, 132 U.S. App. D.C. 200, 208, 407 F. 2d 330, 338 (1968). (p. 539, n. 73)

According to the Court, “Congress gave OSHA the responsibility to protect worker health and safety, and to explain its reasons for its actions” (p. 540). However, the Act didn’t authorize OSHA to repair general unfairness to employees that [was] unrelated to achievement of health and safety goals ...” (p. 540). Because OSHA related the wage guarantee regulation to an effort to reduce adverse economic effects on workers, which was not authorized by the Act, and because OSHA didn’t relate the wage requirement to worker health and safety as required by the Act, the Court ruled that “OSHA acted beyond statutory authorization when it issued the wage guarantee regulation” (p. 540).

*Concurring/dissenting opinions.*

Justice Stewart’s dissent focused on what he perceived to be a failure by OSHA to “justify its estimate of the cost of the Cotton Dust Standard on the basis of substantial evidence” (p. 542). Justice Rehnquist’s dissent, which was joined by Chief Justice Burger, expressed his belief “that the Act exceed[ed] Congress’ power to delegate legislative authority to nonelected officials” (p. 543). In his expressed opinion, “Congress simply left the crucial policy choices in

the hands of the Secretary of Labor” (p. 548). For Rehnquist, the critical issue revolved around a cost-benefit analysis which Congress should have “either mandated, permitted, or prohibited” (p. 548). However, according to the majority opinion and according to the record, such an analysis had been considered by Congress and had been rendered secondary to the more important issue of providing feasible requirements to ensure workers’ health in the cotton industry.

**The commerce clause/spending power versus the tenth amendment – Attachment of conditions to federal legislation by congress that require state government compliance to access federal funds.**

*United States v. Butler, 297 U.S. 1 (1936).*

*Facts & procedural history.*

As part of the New Deal’s efforts to address the impact of the Great Depression upon agriculture by promoting economic recovery, Congress enacted the Agricultural Adjustment Act (AAA) of 1933. The Act empowered the Secretary of Agriculture (Henry Wallace, a native Iowan) to enter into voluntary agreements with farmers to reduce planted acreage in return for government payments, the proceeds of which were to be provided by taxes levied upon the first processor of the particular commodity involved. The amount of taxes levied upon processors depended upon three factors: first, the identity of the commodity; second, the corresponding difference between the current market price and the parity price (the ideal price) measured in terms of purchasing power; and third, the amount needed to close the gap between the current price and the parity price as expressed in a tax rate figured by the Secretary of Agriculture. The parity price for cotton, as for most agricultural products, was the price received during the Golden Age of Agriculture, when rural America thrived economically, the “pre-war period from 1909 to 1914,” (p. 25). Before becoming finalized, the initial parity price was adjusted for

inflation in order to equalize purchasing power between the current period and the ideal period (p. 25).

William M. Butler, “a wealthy textile manufacturer who had served as Calvin Coolidge’s campaign manager and as chairman of the Republican National Committee,” became involved with a company that refused to pay the tax to its cotton processor (Culver & Hyde, p. 158). The cotton processor, Franklin Process Company, filed suit in the federal District Court for the District of Massachusetts, to recover “a balance due on processing and floor stock taxes” that was presented as “a claim of the United States for \$81,694.28” (8 F. Supp. 552, 553). The defendant, Hoosac Mills Corporation, appointed Butler and “James A. McDonough, both of Boston,” as receivers for itself (8 F. Supp. 552, 553). A good portion of Butler’s funding for the legal battle came from Frederick Prince, an “implacable opponent of the New Deal” who “was said to have spent a million dollars in legal challenges to Roosevelt’s programs” (Culver & Hyde, p. 158).

The federal district court, in *Franklin Process Co. v. Hoosac Mills Corp.*, ruled in favor of the federal government’s claim as presented by the Franklin Process Company. The opinion, written by District Judge Elisha H. Brewster for the U.S. District Court of Massachusetts, presented four features of interest. First, Butler and McDonough’s attorneys argued that the Agricultural Adjustment Act of 1933 was “repugnant to the constitutional guarantee of a Republican form of government” because in its regulation of agricultural production, the Government was intruding into an area reserved to the states (8 F. Supp. 552, 562). Judge Brewster dismissed the claim by repeating a quote of the Court in *Mountain Timber Co. v. Washington*: “As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress and not to the courts” (8

F. Supp. 552, 562). What Judge Brewster neglected was the origin of the principle he used and the succeeding opinions cited by the Court in *Mountain Timber Co. v. Washington* as substantiation for its summarization of the legal principle, a principle which began with *Luther v. Borden* in the neighboring state of Rhode Island involving the political disenfranchisement of textile workers and was continued by subsequent Court opinions in *Pacific States Telephone & Telegraph Co. v. Oregon*, *Kiernan v. Portland, Oregon*, *Marshall v. Dye*, and *Davis v. Ohio*.

Second, the District Court did not find that the Act violated the Tenth Amendment. First, Judge Brewster noted that “the commerce powers ... could not be extended to reach a crop of wheat or cotton” (8 F. Supp. 552, 561). As he further explained, “If, therefore, Congress had undertaken by coercive measures to regulate the amount of wheat or cotton a farmer should produce, a serious constitutional question would arise whether Congress had not extended the frontier of federal bureaucratic activities too far” (8 F. Supp. 552, 561). And, as Judge Brewster concluded, coercive measures were not involved. According to the federal Massachusetts District Court’s opinion:

But, as has already been noted, the authority delegated to the Secretary of Agriculture by the first sub-division of section 8 cannot be brought to bear upon any one who does not voluntarily submit to it and this for a monetary consideration. (8 F. Supp. 552, 561)

Third, Judge Brewster’s opinion included an informative discussion focused on the issue of unlawful delegations of legislative power. Tracing the origins of the “doctrine” back to Montesquieu, Brewster noted its first recognition by Chief Justice Marshall and discussed subsequent case law dealing with the issue (8 F. Supp. 552, 557). Brewster also noted the issue was “not peculiar to the United States,” observing that English courts “have given serious consideration to the growing mass of administrative law in that country” (8 F. Supp. 552, 557). Pointing to the centrality of the issue to the case at hand, Judge Brewster opined, “It must, I



think, be conceded that legislative functions are conferred upon administrative officers by the act” (8 F. Supp. 552, 558). “But,” he continued, “whether there has been an unlawful delegation of power is to be doubted upon the authorities” (8 F. Supp. 552, 558). District Court Judge Brewster explained by alluding to the relationship of lower federal courts with the Supreme Court and the role of *stare decisis* in lower federal court decisions, an explanation that provided the fourth feature of interest presented by this federal lower court decision:

The courts have not as yet clearly defined the line between lawful and unlawful delegation of legislative power. While the Agricultural Adjustment Act would seem to come near the line, it would be presumptuous for this court to undertake to put the act outside the circle of the Constitution in view of earlier acts already cited which have received the sanction of the Supreme Court. (8 F. Supp. 552, 558-559)

Upon appeal to the First Circuit Court of Appeals, the case became officially known as *Butler et al. v. United States*. One factor had changed during the interim between the district court’s ruling and that of the circuit court. The U.S. Supreme Court issued two decisions that further defined the line between lawful and unlawful delegation of legislative power, the “Panama Refining Co. Case and the Schechter Poultry Corporation Case” (78 F.2d 1, 12).<sup>83</sup> For the First Circuit Court of Appeals, these decisions “clearly condemn[ed] it [the AAA’s delegation of power to the Secretary of Agriculture] as unwarranted under the Constitution” (78 F.2d 1, 12). To further buttress its delegation of authority reasoning, the First Circuit Court connected the delegation issue to the doctrine of the separation of powers. The Circuit Court of Appeals did so by quoting a portion of the Constitution of Massachusetts that contained John Adam’s answer to a question posed centuries ago by Aristotle. Although Adams had answered Aristotle’s question partly by referencing the separation of powers doctrine, the Circuit Court used that answer to connect separation of powers to the delegation of authority issue, perhaps

unaware of the ancient line of political thought involved (See n. # 67). The portion of the state constitution cited read:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men. (78 F.2d 1, 8)

The First Circuit Court also thought the AAA “attempted to invade a field over which [Congress] has no control, since its obvious purpose, viz. to control or regulate the production of agricultural products in the several states ... [was] beyond the power of Congress” (78 F.2d 1, 7). Government attorneys contended the Court’s focus should be fixed upon taxation to provide for the general welfare while Butler’s attorneys argued for a focus upon the Tenth Amendment via the effects and purpose of the Agricultural Adjustment Act of 1933. According to the Court:

The issue is not, as the government contends, whether Congress can appropriate funds raised by general taxation for any purpose deemed by Congress in furtherance of the “general welfare,” but whether Congress has any power to control or regulate matters left to the states and lay a special tax for that purpose. (78 F.2d 1, 7)

The following statement by the First Circuit Court of Appeals foreshadowed Attorney Pepper’s argument used before the Supreme Court on Butler’s behalf, a Tenth Amendment argument focused on constitutional limitations to which Pepper added imagery in the form of a question about the nature of the federal legislature, i.e., was it an unrestricted parliament or a constitutionally restricted congress. The Court stated:

If Congress can take over the control of any intrastate business by a declaration of an economic emergency and a public interest in its regulation, it would be difficult to define the limits of the powers of Congress or to foretell the future limitations of local self-government. (78 F.2d 1, 11)

By a 2-1 majority, the First Circuit Court of Appeals overturned the district court's ruling, holding that the AAA unconstitutionally: 1) delegated legislative authority to the Secretary of Agriculture; and 2) "invaded a field over which it ha[d] no control under the Constitution since it was a field reserved to the states by the Tenth Amendment (78 F.2d 1, 12). With Butler's position regarding the unconstitutionality of the AAA being upheld by the First Circuit Court, the federal government appealed to the U.S. Supreme Court.

*Legal questions.*

Does the processing tax represent a valid exercise by Congress of its taxing authority? Does the Agricultural Adjustment Act regulate production, an activity reserved to the States, in contravention of the Tenth Amendment? Does the Act unconstitutionally delegate legislative authority to an administrative agency?

*Legal reasoning of opposing parties.*

The legal team for the federal government included the Attorney General, the Solicitor General, two Assistant Attorneys General, and six government attorneys, at least one of whom, Alger Hiss, worked for the legal division of the Department of Agriculture (p. 13).<sup>84</sup> Solicitor General Reed provided oral argument while all attorneys contributed to the written brief submitted to the Court.

Although Congress cited the Commerce Clause in enacting the AAA, the government attorneys did not defend the Act on that basis.<sup>85</sup> Instead the Act was portrayed as a legitimate exercise of the taxing and spending power of Congress. Article I, § 8. cl. 1 of the Constitution, the General Welfare Clause, "gave Congress power to expend it [the processing tax] for rental and benefit payments" (p. 12). The Act made use

of a tax levied on processors in the form of an excise passed on the general consuming public, the purpose of which [was] to raise money to be used by

the Government in contracts with farmers, for the reduction of surplus production that was pressing on the price and pressing on the supply... (p. 13)

According to the government attorneys, both the “processing and floor-stock taxes [were] excises; not direct taxes” that were forbidden (p. 13). The Solicitor General stated the Government’s position, “Our contention is that the welfare clause gives the right to tax and the right to appropriate, so long as the appropriations are limited to the general welfare” (p. 49). The Government attempted to re-frame the issue to avoid the Tenth Amendment issue regarding the allegation that the Act regulated agricultural production, which was a power reserved to the states. According to Solicitor General Reed:

The vital point of assault and defense upon the Agricultural Adjustment Act seems to me not to be in the Tenth Amendment, ... but as to whether the Government has the power to appropriate money which it raises by taxation for the benefit of individuals in the States, or to carry out contracts which the Government makes with those individuals. (p. 49)

The following arguments were addressed in the written brief, but not mentioned in oral argument:

- “Powers were not unlawfully delegated” (p. 14).
- “The processing and floor-stock taxes do not contravene the Fifth Amendment” (p. 14).
- “The general welfare clause should be construed broadly to include anything conducive to the national welfare; it is not limited by the subsequently enumerated powers” (p. 16).
- “Power of control over or regulation of agriculture has not been asserted” (p. 21).

- “The contracts are a matter of negotiation and voluntary agreement” whereby “the Secretary of Agriculture sees that the money appropriated goes to persons in the class specified by Congress” (p. 21).
- “The distinction between an application of the law-making power to enforce compliance, and the use of the spending power to persuade, was pointed out in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529” (p. 22).

The government’s arguments presented difficulty in terms of coherence and logical structure, possibly because of the nature of their argument in trying to assert that the AAA was not a regulation of agricultural production, when in fact that was the stated purpose of the Act. Section 2 of the Act declared the policy of Congress to be “[t]o establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefore...” (p. 54). Section 8 spelled out congressional policy more specifically when it authorized the Secretary of Agriculture “[t]o provide for reduction in the acreage or reduction in the production for market ... in such amounts as the Secretary deems fair and reasonable” (p. 54). In contrast to the structure of the Government’s arguments, those presented by the cotton attorneys were quite masterful and persuasive in terms of framing the critical issues they wanted to be viewed as controlling the case.

The legal team for the cotton manufacturers was headed by George Wharton Pepper, who was assisted by an additional six attorneys. Mr. Pepper, formerly a professor of law at the University of Pennsylvania and U.S. Senator for Pennsylvania, provided the major portion of oral argument while two other attorneys provided oral argument challenging the Act as an improper delegation of authority by Congress (For Pepper, see Hall, 1992, pp. 630-631; for attorney team, see pp. 44-45 of the opinion). Pepper also happened to be “the close friend and

political patron of Justice Owen J. Roberts,” the justice who would write the majority opinion for the Court (Culver & Hyde, p. 159).

As mentioned previously, the arguments presented by the attorneys for the cotton manufacturers, particularly those advanced by Mr. Pepper, were both masterful and persuasive in framing the legal issues to which they wished to draw attention. The arguments were organized in a step-by-step logical progression accompanied by a convincing legal analysis, supplemented at various points by the use of propaganda techniques, all of which were woven into a spell-binding narrative supported by illustrations drawn from the existing case law. And it was the existing case law regarding regulation of production as a matter of control reserved to the states by the Tenth Amendment that proved a source of strength for the cotton manufacturers and conversely, proved to be the downfall for the Government until that case law was changed, first in being modified by *NLRB v. Jones & Laughlin Steel Corporation* and other cases before being completely overthrown by the Court’s later decision in *Darby*.

According to Mr. Pepper, the two most important questions involved the constitutionality of the taxes levied by the AAA and the validity of the delegation of authority by Congress to the Secretary of Agriculture, Henry Wallace. After summarizing the major points of the Government’s argument as presented by Solicitor General Reed, Mr. Pepper drew a clear line of demarcation by way of characterization between the Government’s position and that of the cotton manufacturers. The line drawn by Mr. Pepper involved an issue going back to the Revolutionary War, the difference in legislative systems between England’s Parliament and America’s Congress, an issue that prompted Lord Acton to characterize the Revolution “as a contest between two ideas of legislative power” (Corwin, 1965, p. 83). According to Mr. Pepper:

It seems to me that a reversal of the judgment appealed from would justify the conclusion that Congress, originating as a federal legislature with limited powers, has somehow been transformed into a national parliament subject to no restraint except self-restraint. (p. 24)

For those not familiar with England's parliamentary system, a brief explanation is needed in order to fully understand the contrast being framed by Attorney Pepper. The great English commentator on law, Sir William Blackstone, observed, "So long ... as the English Constitution lasts, we may venture to affirm that the power of Parliament is absolute and without control" (Corwin, 1965, p. 87). Commenting on Blackstone's observation, an American professor of law further explained, "This absolute doctrine was summed up by De Lolme a little later in the oft-quoted aphorism that 'Parliament can do anything except make a man a woman or a woman a man'" (Corwin, 1965, p. 87). The roots of the English system of legislative sovereignty traced back to Roman law. According to Professor Corwin:

Thus legislative sovereignty, a derivative from the notion of popular sovereignty in the famous text from Justinian ... was recruited afresh from the parent stream, with the result that all the varied rights of man were threatened with submergence in a single right, that of belonging to a popular majority, or more accurately, of being represented by a legislative majority. (Corwin, 1965, p. 88)

The text referred to by Professor Corwin in the previous quote came from Justinian's *Institutes* and read, "Whatever has pleased the prince has the force of law, since the Roman people by the *lex regia* enacted concerning his *imperium*, have yielded up to him all their power and authority" (Corwin, 1965, p. 4).

All of the preceding paragraph would have been called to mind by the justices in hearing Mr. Pepper's remark about "a national parliament subject to no restraint except self-restraint" (p. 24). Of course, everyone present in the Court was familiar with the contrasting American system of government based on "the American invocation of a constitution setting metes and bounds to

Parliament,” or, as stated by Attorney Pepper, “a federal legislature with limited powers” (Corwin, 1965, p. 83; p. 24 of the opinion). This framing of the contrasts between the two positions put forth by Mr. Pepper resonated with the Court majority, as will be shown subsequently in discussing the Court’s rationale for its holding in the case.

To properly frame the issues in a manner advantageous to the cotton processors, Pepper made what he termed “a brief restatement” that occupied the next four pages of the Court’s record of the case (p. 24). Pepper’s purpose, as he admitted later, was to present a “basic statement of the significant parts of the Act and of the facts which it seems to me it is important to bear in mind in approaching the constitutional questions” (p. 29). Mr. Pepper restated the case on his terms, much in the same manner as he might have used in explaining points of law to his students during the seventeen years he spent as a professor of law, by making five basic points:<sup>86</sup>

- “[T]he declared policy of the AAA” was “to re-create for the farmer the favorable financial conditions which, under the operation of economic law, he for a short time enjoyed about a quarter of a century ago” (p. 25). After discussing how this policy was to be implemented, Pepper re-summarized his first point by stating that the “ultimate objective of the Act was to adjust “production to consumption by closing the gap [between current & parity prices] in order to increase the purchasing power of agricultural commodities” (p. 26).
- “[T]he adjustment [to bring current prices to the level of parity] is to be accomplished by a reduction in acreage, or reduction in the production for market, or both” (p. 26). Pepper recast this point to be “that what is really proposed is such a reduced production as will secure for the farmer his parity price” (p. 27).



- “[T]he closing of the gap through reduction of production is to be accomplished principally through agreements with producers containing provisions for ... payments” with the producer “agreeing to act in conformity with the federal policy” (p. 27).
- “[I]n order to raise the money with which to purchase the promise of the farmer to limit his production and otherwise submit to regulation, a processing tax is levied upon processors” with the “rise and fall of the so-called tax ... dependent upon factors wholly unrelated to the business of the processor” (p. 27). Having established the processing tax as a focal point, Pepper later described the processing tax as “merely a cog, though an essential cog, in the regulatory machine” (p. 30).
- “The next point to be noted is that the proceeds of the tax when received by the Secretary of Agriculture are to be available for specific purposes [outlined in the Act]” (pp. 27-28).

Having focused attention upon what he deemed to be five critical points of the AAA, Mr. Pepper next proceeded to reduce the Act’s five essential points to two “constitutional questions” (p. 29). As can be seen from the following quotation, Pepper used his framing of the processing tax issue as a means to move to what became the deciding constitutional question, that issue being the Tenth Amendment. According to Mr. Pepper:

I affirm, first, that the processing exaction is not in its nature the exercise of the taxing power of the United States, but is wholly regulatory in character, and is part of a nation-wide scheme for the Federal regulation of local agricultural production; and, second, that if that scheme as a whole is unconstitutional as an invasion of the reserved powers of the States, then the whole scheme falls and the processing tax falls with it. (p. 29)

Later in his argument, Pepper restated the Tenth Amendment argument that the Agricultural Adjustment Act represented “a scheme to regulate farm production and fix farm prices [which was] an invasion of the field reserved by the Tenth Amendment” (p. 37).

After noting that the Government had used the Commerce Clause to justify the NRA when it was challenged, Mr. Pepper drew attention to the “significant silence on the part of the Government as to the commerce clause” in defending the AAA, which was as it should be “in the light of the *Schechter* decision” invalidating the NRA (p. 38). Bereft of the ability to use the Commerce Clause, “[t]he whole reliance of the Government [was] accordingly placed upon the proposition that we have nothing to consider but an unimpeachable tax and an uncontrollable appropriation” (p. 38). Continuing to pick at what he perceived to be a weakness in the Government’s position, Pepper then observed, “To support the tax argument, the Government invokes the general welfare clause. This seems to me to afford the coldest kind of cold comfort” (p. 38). And then, in a series of statements, Mr. Pepper connected the tax issue, the General Welfare Clause, and the Tenth Amendment to his earlier imagery, the contrast between an omnipotent parliament and a constitutionally limited Congress. First, Pepper noted that problems with taxes didn’t arise unless Congress stipulated a purpose, an act which required the ability to specify “some recognized congressional power” (p. 38). “But,” Pepper observed, “suppose (as here) that the only specific power that might plausibly be invoked (to wit, the commerce power) falls far short of what is required” (p. 38). And then, Pepper proceeded to provide an answer to his rhetorical supposition:

It is then, and then only, that recourse is had to the proposition that it is within the exclusive power of Congress to determine that a particular measure will promote the general welfare and that accordingly a tax to be applied for the purposes of that measure is a valid tax. (pp. 38-39)

Mr. Pepper continued his line of argument:

This proposition, as far as I can see, means this: that Congress may determine that a certain nation-wide policy is necessary to the welfare of the nation; ergo that legislation to effectuate such policy must be within the power of Congress; and that, if you cannot find an applicable specific power which covers the case, you invoke the general welfare clause. (p. 39)

Noting that this amounted to a *de facto* doctrine of “inherent national power” which the Court rejected in *Kansas v. Colorado*, Pepper then portrayed the Government’s position as a violation of the Tenth Amendment, which if allowed to proceed unchecked, would turn Congress into an uncontrollable parliament.

Whether Congress invokes “inherent power” or wallows in the welfare clause – in either event the powers reserved by the Tenth Amendment disappear and that against which I solemnly protest ensues – namely the conversion of a federal legislature into a national parliament – with the consequent destruction of the right of local self-government. (p. 39)

All in all, a quite convincing, persuasive, and patriotic argument – that is, if one ignored the misstatement of the Government’s position which allowed Pepper to create the straw man of inherent national power, subsequently demolished with valid case law, as well as the concluding use of an unwarranted extrapolation to make an appeal based on fear.

Continuing to push the idea of the tax and ensuing appropriation as an attempt to destroy state sovereignty, an attempt which was illogically based upon the General Welfare Clause, Pepper also continued to frame that issue within the context of an imaginary battle between two opposing legislative schemes, i.e., parliamentary versus congressional. Without a clear reference in support of his argument, Pepper even enlisted the support of Hamilton, although that support was obtained through the mere mention of his name, which was then attached to Pepper’s position. According to Pepper:

But I did not know, until this statute [AAA] proposed it, of any interpretation which begins where Hamilton stops, and asserts that because you may appropriate for anything which Congress thinks is consonant with the public welfare, you may, through that appropriation, control the local

conduct of the producer in a particular reserved to the States under the Tenth Amendment. That, it seems to me, is the general welfare clause gone mad. (pp. 39-40)

Pepper, the lead attorney for Butler and the cotton manufacturers, continued:

It seems to me it is impossible to sustain any such view without throwing overboard once and for all the idea that Congress is a federal legislature with limited powers. It carries you all the way to the other extreme, which is that of the national parliament subject to no restraint but self-restraint... (p. 40)

Before concluding his arguments before the Court, Mr. Pepper addressed what he perceived to be Fifth Amendment issues. Noting that the Government had argued that the Fifth Amendment had nothing to do with the case at hand, Pepper stated that he agreed only “if this processing exaction is merely part of a regulatory scheme that is beyond the power of Congress” because in that circumstance, “the reason for the invalidity of the tax is, not the Fifth Amendment, but the lack of power to control local production” (p. 42). If, however, he were wrong, Pepper observed, “the Fifth Amendment applie[d] to the exercise of ... the regulatory power of Congress no matter whence derived” (p. 42). Mr. Pepper suggested “that there [was] something essentially unjust in compelling the first handler of an agricultural commodity to contribute whatever [was] necessary to make up deficiencies in the income of the man who produce[d] that commodity” (p. 43). After discussing the tax rate issue, Pepper surmised:

It would be hard enough on the processor to have to submit to assessment merely to increase the producer’s income; but when we reflect that the increase is accomplished by using the proceeds of the tax to raise the price which the processor has to pay for his raw material, the question arises whether this is the due process which the Fifth Amendment guarantees. (p. 43)

Mr. Pepper concluded, “It seems clear to me that it is not due process to measure an excise on processing by a deficiency in producer’s income” (p. 43). Finally, in concluding his oral arguments before the Court, Pepper uttered a statement, couched in humility and deference to the

Court and delivered in the form of a prayer, that combined hyperbole, waving-the-flag, and an appeal to fear based on an unwarranted extrapolation. According to Mr. Pepper:

Indeed, may it please your Honors, I believe I am standing here today to plead the cause of the America I have loved; and I pray Almighty God that not in my time may “the land of the regimented” be accepted as a worthy substitute for “the land of the free.” (p. 44)

At this point, Mr. Pepper turned to two other attorneys on his legal team to deliver arguments focused on the AAA as an unconstitutional delegation of authority. They, however, devoted the vast majority of their argument (slightly more than four pages of the Court’s report of the case) rehashing what Pepper had already argued. Their argument regarding the delegation of authority issue consisted of a single sentence followed by nine case citations. Their sentence read, “The Act is invalid in that it delegates legislative power to the Secretary of Agriculture” (p. 48). How, and in what way, the Act delegated such authority was not presented. It was, however, explained more fully by Pepper in one of his side comments to the Court during the presentation of his arguments. After restating the case in terms of his own five major points, but previous to his reducing those essential points to two constitutional questions, Mr. Pepper pointed out to the Court that he had “carefully refrained from stating such features of the act as give rise to the question of delegated power” because it would be more “conduc[ive] to clearness to reserve a reference to those features until the argument on delegation [was] made” (pp. 28-29). However, having raised the issue of delegated power, Pepper couldn’t refrain from further comment. Using a measure of hyperbole, Mr. Pepper observed:

I merely remark in passing that the whole scheme of the act necessarily calls for so many determinations, adjustments and decisions on points of policy that it might fairly be described as a scheme for the government of agriculture with the Secretary of Agriculture as Governor General.

*Holding & disposition.*

The Court affirmed the ruling of the First Circuit Court of Appeals. The Court held that the “act invade[d] the reserved rights of the states” guaranteed by the Tenth Amendment because the AAA was “a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government” (p. 68). The processing tax and the subsequent appropriation of the tax funds were “but parts of the plan” and were “but means to an unconstitutional end” (p. 68). The Court did not rule on the delegation of power issue.

*Court’s rationale.*

Justice Owen Roberts delivered the 6-3 decision of the Court. He was joined by Chief Justice Hughes and the Four Horsemen (Justices Butler, Van Devanter, Sutherland, and McReynolds).<sup>87</sup> Justice Harlan Fiske Stone delivered a dissenting opinion that was joined by Justices Brandeis and Cardozo. The majority opinion was described by a historian as “a wretchedly argued opinion,” by Justice Stone in his dissenting opinion as a “tortured construction of the Constitution,” by legal scholar Leonard Levy as “monumentally inept,” by another historian as “one of the worst decisions in its [the Court’s] history,” and later by Justice Felix Frankfurter as “discredited” (Leuchtenburg, p. 170; p. 87; Hall, 1992, p. 111; Brogan, p. 554; Hall, 1992, p. 112). Deep in the nation’s heartland, in Iowa, the reaction took the form of physical action as “the six justices who handed down the decision were hanged in effigy” (Leuchtenburg, p. 171). Farm prices reacted to the Court’s decision as well by exhibiting “a sharp decline” (Leuchtenburg, p. 171). Furthermore, the opinion did not control subsequent Court action as its underlying case law was modified in a series of decisions before being overturned by the *Darby* decision. A professor of political science described the changing judicial scene:

The tax provisions of the Social Security Act were upheld in *Steward Machine Co. v. Davis* (1937), and the agricultural program struck down in

*Butler* was reenacted by Congress under the commerce power and upheld in *Mulford v. Smith* (1939) and *Wickard v. Filburn* (1942). (Hall, 1992, p. 112)

Also contributing to the change in subsequent Court rulings were the isolation of the Four Horsemen by swing justices (Roberts and the Chief Justice) as well as the one-by-one replacement of the justices known as the Four Horsemen during the next four to five years (See n. # 70).

Admittedly the opinion was somewhat difficult to read. A number of reasons existed, each of which served as a cause of this difficulty. First, the opinion wandered. For example, in addressing the issue of standing, the Court began by articulating the two opposing positions, then discussed the Government's argument for separating the Act into two statutes, then discussed the tax, then discussed the purpose of the Act, then compared the Act to a previous immigration act, then jumped back to discussing what a tax was, and then concluded that the Act regulated agricultural production with the tax being "a mere incident of such regulation and that the respondents have standing to challenge the legality of the exaction" (p. 61). As can be seen from the previous example, both the structural and the logical components of the Court's majority opinion, or more precisely, the seeming absence of such components, presented difficulty for the reader.

A second area of difficulty involved simplistic reasoning that challenged credulity. For example, in discussing the General Welfare Clause, the Court abruptly began discussing the nature of the Court's role and how it reached its judgments regarding constitutionality. As the Court explained:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, - to lay the article of the Constitution which

is invoked beside the statute which is challenged and to decide whether the latter squares with the former. (p. 62)

Such an explanation ignored fundamental considerations involving the nature of the issue, the intersection of facts and legal rules, which rules should be applied and why, previous understandings, and prior court decisions, just to name a few omissions from the Court's explanation of how constitutionality is determined.

A third area of difficulty involved determining, after wading through wandering discourses and simplistic reasoning, when the Court made valid points in its opinion, a determination of which required both tenacity and prior knowledge. One such possibility involved the Court's comments about the nature of the Constitution as a general blueprint as opposed to a detailed plan. While discussing the General Welfare Clause, the Court noted, "As elsewhere throughout the Constitution the section in question lays down principles which control the use of the power, and does not attempt meticulous or detailed directions" (p. 67).

A fourth area of difficulty involved the Court's making a unique determination, which it then rendered irrelevant, and which it later contradicted in making a subsequent ruling. The unique determination centered on the taxing power of Congress as linked to the General Welfare Clause (Article I, § 8, cl. 1), "to provide for the general welfare of the United States" (p. 65). Prior to *Butler*, the issue had not been definitively resolved. Disagreements about this issue traced back to differing opinions on the matter that were offered by Alexander Hamilton and James Madison. After observing that "sharp differences of opinion have persisted as to the true interpretation of the phrase" going all the way back to "the foundation of the Nation," the Court summarized each position, beginning with Madison (p. 65).

Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the



grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. (p. 65)

Turning to Hamilton, the Court stated:

Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. (pp. 65-66)

After noting that “Mr. Justice Story ... espouse[d] the Hamiltonian position,” the Court announced its conclusion by stating, “Study of all these [the writings of Story, of public men, and of commentators as well as legislative practice] leads us to conclude that the reading advocated by Mr. Justice Story is the correct one” (p. 66). The Court explained further:

While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results then that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution. (p. 66)

However, the Court noted, the issue was irrelevant. This occurred despite the Court’s earlier assertion that the General Welfare Clause “present[ed] the great and the controlling question in the case” (p. 62). However, according to the Court, “We are not now required to ascertain the scope of the phrase ‘general welfare of the United States’ or to determine whether an appropriation in aid of agriculture falls within it” (p. 68). Introducing its shift to a completely different argument, the Court next stated, “Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act” (p. 68). The other principle, as the Court announced, turned out to be the Tenth Amendment. And in this manner, the Court reached its major holding. The Court continued:

The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end. (p. 68)

On the one hand, the processing tax and the appropriation to farmers, if in the general welfare of the United States as stipulated by Congress, were constitutional. On the other hand, it didn't matter since both were part of an overall scheme to invade "the reserved rights of the states" (p. 68). The contradiction arose from the Court's use of Hamilton. As discussed, it had first officially noted that Hamilton's interpretation of the General Welfare Clause was the correct one, which would have made the tax and subsequent appropriation constitutional. In shifting to the Tenth Amendment argument, the Court then used Hamilton's original opinion on the Bank's constitutionality as summarized by Chief Justice Marshall to justify its Tenth Amendment holding on the unconstitutionality of the AAA. The Court introduced its twist of logic by quoting from a previous ruling dealing with an entirely different issue, the delegation of power, in which it stated, "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government" (p. 69). After verbally connecting the issue of delegated power to the issue of taxation without providing any explanation, the Court then quoted Chief Justice Marshall's paraphrase of Hamilton (See n. # 50):

These principles are as applicable to the power to lay taxes as to any other federal power. Said the court, in *McCullough v. Maryland*, *supra*, 421: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (p. 69)

In effect, the Court had Hamilton arguing with himself. It was a basic figure-ground perceptual switch that contained no logic. Bringing Hamilton's view on the General Welfare Clause

validated the constitutional figure of taxation and appropriation. If the view was abruptly shifted so that the constitutional figure of the Tenth Amendment case law's prohibition on regulating production by the federal government became the focus, one arrived at a different result. The two views did not match. And then, bringing in Hamilton to justify the illogical shift in the Court's focus compounded an existing juxtaposition that was not entirely logical.

A fifth area of difficulty lay in the Court's explanation of the working of the Tenth Amendment in this case. Instead of a single explanation, there existed two discernible lines of exegesis regarding the applicability of the Tenth Amendment to the case, although the second line was harder to detect because its different parts lay scattered throughout the opinion. The first line of reasoning involved the case law of the Tenth Amendment prohibiting the federal government from regulating production, whether industrial or agricultural, which was presented previously. The second exegetical line focused on the taxing power as outlined in Article I, § 8, cl. 1 of the Constitution, the reasoning of which foreshadowed future Justices' explanations of the Tenth Amendment limitations as expressed, not in terms of the actual text or of existing case law, but in terms of the Tenth as the "embodiment of the federal system, the "spirit of the Tenth Amendment," the "federal framework," and the "structure of the Constitution" (For more information about the preceding phrases, see the parenthetical note on p. 595 of this paper). In this case, the explanatory line of thought began with the following statements.

There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the [taxing] power if so exercised as to impair the separate existence and independent self-government of the States or if exercised for ends inconsistent with the limited grants of power in the Constitution. *Veazie Bank v. Fenno*, 8 Wall. 533, 541. (pp. 69-70)

The Court picked up this line of reasoning several pages later:

If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause I of § 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states. (p. 75)

Later the Court enlisted both Hamilton's and Justice Story's assistance, which it combined with the use of both hyperbole and an unwarranted extrapolation, in its exegetical explication from mystical sources of a reason for the Court's position:

Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States, (which has aptly been termed "an indestructible Union, composed of indestructible States,") might be served by obliterating the constituent members of the Union. (For use of the parenthetical dicta, see note #61 of this paper) (p. 77)

The conclusion to this exegesis of the workings of the Tenth Amendment incorporated the imagery first suggested by the lead attorney for the cotton manufacturers, Claude Pepper, regarding the distinction between an English Parliament and an American Congress. The conclusion also featured the use of an unwarranted extrapolation, which was combined with both hyperbole and an appeal to fear.

And its [the doctrine that the General Welfare Clause justified the destruction of state governments] sole premise is that ... the makers of the Constitution, in erecting the federal government ... so as to reserve to the states and the people sovereign power, ... they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed. (p. 78)

Finally, a sixth area of difficulty centered on the Court's continuation of a rambling discourse after it had already invalidated the AAA, a discussion that occupied eight more pages and which contained ten additional holdings. With a total of thirteen holdings in the case, it was

somewhat difficult to determine which holding related to what legal point, and then, in turn, determine what legal bearing it had on which constitutional issue. The continued discussion after the Act had already been invalidated contained some remarks about conditional spending which had no bearing on the outcome of the Court's ultimate decision. For example, the Court declared, "The regulation of the farmer's activities under the statute, though in form subject to his own will, is in fact coercion through economic pressure; his right of choice is illusory" (p. 3). Then, as if having had second thoughts about the previous statement, the Court re-stated its position by stating, "Even if the farmer's consent were purely voluntary, the Act would stand no better. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the States" (p. 3). Although the foregoing remarks were cited from their summary on page three of the Court's opinion, they actually were taken from pages 70 and 72. One page later, the Court picked up the same thread again when it observed, "There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced" (p. 73). However, the Court did not render the Act unconstitutional on the basis of conditional spending stipulations.

All in all, the Court's opinion did not constitute a model of clear, focused, and logical legal reasoning. The vast majority of Supreme Court decisions reviewed thus far in this paper didn't require examination of the preceding lower court decisions in order to provided elucidation of legal points, arguments, and reasoning. In this case, however, a reading of the lower court decisions provided a clearer focus than did the Court's *Butler* decision.

*Concurring/dissenting opinions.*

Justice Harlan Fiske Stone delivered a dissenting opinion, which was joined by Justice Louis Brandeis and by Justice Benjamin Cardozo. Described as a “scathing rebuttal,” Justice Stone wrote a dissent that could have served as the Court’s majority opinion if enough justices had been so inclined at the time (Hall, 1992, p. 112). Stone took the Court’s unique determination regarding the General Welfare Clause, framed that determination perceptually as figure (in Gestalt terms), and, unlike the Court majority in backing away from the implications of its own decision regarding the general welfare, applied the now official interpretation of the General Welfare Clause to the facts of the case. In the process, Justice Stone also delivered dicta regarding principles of judicial review that were collectively described as “the most enduring feature of the [Butler] decision” and which were subsequently “invoked on many subsequent occasions by Court minorities, both liberal and conservative” (Hall, 1992, p. 112).

Justice Stone first identified what was not questioned by the Court’s majority opinion. Congressional authority to “levy an excise tax upon the processing of agricultural products [was] not questioned” (p. 79). Neither did the Court declare that using public funds to aid farmers was “not within the specifically granted power of Congress to levy taxes to ‘provide for the .... general welfare’” (p. 79). While it was true that the Court majority had invalidated the AAA’s levy, it had done so “because the use to which its proceeds [were] put [was] disapproved” (p. 79). Drawing attention to the “pivot on which the decision of the Court [was] made to turn,” Justice Stone provided elucidation:

It is that a levy unquestionably within unquestionably within the taxing power of Congress may be treated as invalid because it is a step in a plan to regulate agricultural production and is thus a forbidden infringement of state power. (p. 80)

The Justice then made a critical point that differentiated him from the Court majority when he pointed out, “The levy is not any the less an excise of taxing power because it is intended to

defray an expenditure for the general welfare rather than for some other support of government”

(p. 80). Referring to the payments made to farmers who had willingly curtailed “their productive acreage,” Justice Stone further noted (p. 80):

In saying that this method of spending public moneys is an invasion of the reserved powers of the states, the Court [did] not assert that the expenditure of public funds to promote the general welfare is not a substantive power specifically delegated to the national government, as Hamilton and Story pronounced it to be. (pp. 80-81)

Furthermore, according to Justice Stone, the Court majority didn’t deny that the payment of funds to farmers who agreed to curtail their agricultural production was “within the specifically granted power” (p. 81).

Continuing to keep the focus on the taxing and spending authority contained in the General Welfare Clause, Justice Stone noted the Court majority’s position prefatory to critiquing that position, “It is upon the contention that state power is infringed by purchased regulation of agricultural production that chief reliance is placed” (p. 83). And then, precursory to later dissents regarding the Court’s application of the Tenth Amendment without textual support for negating congressional use of a delegated power, Justice Stone pointed out:<sup>88</sup>

It is insisted that, while the Constitution gives to Congress, in specific and unambiguous terms, the power to tax and spend, the power is subject to limitations which do not find their origin in any express provision of the Constitution and to which other expressly delegated powers are not subject. (p. 83)

Regarding the conditional offer (i.e., in exchange for money, the producer agrees to reduce crop-production acreage), Justice Stone observed:

Although the farmer is placed under no legal compulsion to reduce acreage, it is said that the mere offer of compensation for so doing is a species of economic coercion which operates with the same legal force and effect as though the curtailment were made mandatory by Act of Congress. (p. 81)

And then, noting the Court's apparent unsureness about what was covered by the term "coercive," Stone reported:

In any event it is insisted that even though not coercive the expenditure of public funds to induce the recipients to curtail production is itself an infringement of state power, since the federal government cannot invade the domain of the states by the "purchase" of performance of acts which it has no power to compel. (p. 81)

Responding to the Court's assertion of coercion regarding the offer, Justice Stone pointed out, "[I]t is enough to say that no such contention is pressed by the taxpayer, and no such consequences ... appear to have resulted from the administration of the Act" (p. 81). Stone continued, "The suggestion of coercion finds no support in the record or in any data showing the actual operation of the Act" (p. 81). According to Stone, not only did the Court lack textual support for its application of the Tenth Amendment to eliminate congressional use of a delegated power, the Court also lacked evidentiary support for its contention regarding the Act's coerciveness. Justice Stone felt compelled to remind the Court what coercion actually was by stating, "Threat of loss, not hope of gain, is the essence of economic coercion" (p. 81). Stone then noted that one-third of the "total number of farms growing cotton" did not participate in the AAA in 1934 (p. 82). Justice Stone reminded the Court, "The presumption of constitutionality of a statute is not to be overturned by an assertion of its coercive effect which rests on nothing more substantial than groundless speculation" (p. 83).

Maintaining a focus on the General Welfare Clause, Justice Stone discussed the constitutional requirement "that public funds shall be spent for a defined purpose, the promotion of the general welfare" (p. 83). Stone further noted that the expenditure of public funds required "terms" in order to insure that they would be used for their intended "constitutional purpose" (p. 83). Justice Stone concluded:



Expenditures would fail of their purpose and thus lose their constitutional sanction if the terms of payment were not such that by their influence on the action of the recipients the permitted end would be attained. The power of Congress to spend is inseparable from persuasion to action over which Congress has not legislative control. (p. 83)

Stone pointed to the example of the Morrill Act as an example. The Act didn't command state universities to teach the "science of agriculture," but it did grant money to state universities who promised to use the funds for that purpose (p. 83). Justice Stone noted, "Condition and promise are alike valid since both are in furtherance of the national purpose for which the money is appropriated" (p. 84). Getting to what he perceived to be the heart of the matter, Justice Stone declared that the Court's use of the Tenth Amendment to limit congressional use of the delegated power of the General Welfare Clause was "contradictory and destructive of the power to appropriate for the public welfare;" furthermore, such an interpretation was "incapable of practical application" (p. 85). Justice Stone continued:

The spending power of Congress is in addition to the legislative power and not subordinate to it.... It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure. (p. 85)

Justice Stone concluded by noting that the Court needed to give "frank recognition" to the proposition "that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nation-wide economic maladjustment by conditional gifts of money" (p. 88).

As mentioned at the outset of this section, Justice Stone made statements regarding principles of judicial review in his dissenting opinion. At the outset Justice Stone observed, "The power of courts to declare a statute unconstitutional is subject to two guiding principles of

decision which ought never to be absent from judicial consciousness” (p. 78). For the Court’s benefit, Stone then proceeded to spell out what those two “guiding principles” were:

One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government. (pp. 78-79)

Justice Stone presented his other major point regarding judicial review near the conclusion of his dissent, which he began by stating, “Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty” (p. 87). Justice Stone provided further elucidation in the form of a warning:

But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, “to obliterate the constituent members” of “an indestructible union of indestructible states”... (pp. 88-89)

***Mulford v. Smith, 307 U.S. 38 (1939).***

*Case summary.*

The Court’s report of this case did not contain separate sections for attorney arguments by either appellant or appellee. Neither did the opinion elaborate on the two opposing sides’ legal arguments except to summarize the three major points urged by attorneys for the tobacco producers. As a result the shorter brief format was used.

In order to fully comprehend why, given that both acts (the Agricultural Adjustment Act of 1933 and the Agricultural Adjustment Act of 1938) aimed to control agricultural production, one act failed and the other act succeeded, in terms of passing constitutional muster, several

contexts need to be understood. When it came time for the Court to rule on the second Agricultural Adjustment Act (AAA) of 1938, the Court had changed significantly since it had declared the first AAA to be an unconstitutional infringement of the Tenth Amendment (For the holding in *United States v. Butler*, see pp. 642-643 of this paper). The Four Horsemen were now down to two members, Pierce Butler and James McReynolds (See n. # 70). In the aftermath of FDR's court-packing plan, as well as the shift of Chief Justice Hughes and Justice Roberts away from the conservative Four Horsemen and towards the liberal justices (Brandeis, Cardozo, and Stone) in the case upholding the constitutionality of the New Deal's National Labor Relations Act (*National Labor Relations Board v. Jones & Laughlin Steel Corp.*), one of the Horsemen, Justice Willis Van Devanter, announced his retirement to become effective June 2, 1937 (Hall, 1992, pp. 894-895, 986). Hugo Black filled the seat left vacant by Van Devanter's retirement (Hall, 1992, p. 986). The second Horseman to leave the Court, George Sutherland, subsequently resigned from the Court seven months later on January 17, 1938, and was immediately replaced by Stanley Reed (Hall, 1992, pp. 848, 986). Subsequent to the departure of two justices committed to laissez-faire constitutionalism, Justice Cardozo died on July 9, 1938, but Felix Frankfurter did not fill his seat until January 30, 1939 (For laissez-faire constitutionalism, see previous discussion of *Hammer v. Dagenhart*, "Court's Rationale," pp. 372-373) (Hall, 1992, pp. 126-127, 986). Justice Brandeis retired from the Court on February 13, 1939, and was replaced on the bench by William O. Douglas, who appeared for his first Court decision in this case (Hall, 1992, p. 986; 307 U.S. 38).

The basis for the AAA had changed as well. While the first Act of 1933 was argued on the basis of congressional taxing power under the General Welfare Clause, Congress explicitly based the second Agricultural Adjustment Act of 1938 on the Commerce Clause. Government

attorneys accordingly argued for the second Agricultural Adjustment Act's constitutionality on the basis of the commerce power of Congress.

Political factors also played a role. *Butler* had been decided prior to both the overwhelming vote of confidence given FDR's New Deal programs in the 1936 elections, an election which swept conservative Republicans from public office. As one historian described the election results, "For the fourth election running the Democrats increased their numbers in Congress; for the first time since 1894 there were fewer than a hundred Republican Congressmen; and there were only sixteen Republican Senators" (Brogan, p. 561). *Butler* had also been decided before FDR revealed his court-packing plan immediately following his re-elective public mandate to continue his course of action. Although the plan was defeated, two moderate Justices of the Court (Chief Justice Hughes and Justice Roberts) who were the swing votes between the conservative Four Horsemen and the three liberal Justices (Justices Brandeis, Cardozo, and Stone), never again sided with the Four Horsemen in cases involving national attempts to regulate the economy. According to one assessment:

Mr. Justice Roberts and the Chief Justice himself had at last understood the danger to the Court of constantly challenging the Presidency, Congress and the voters, and adopted the doctrines of judicial caution which Stone and Brandeis had been vainly urging upon them for years. (Brogan, p. 564)

Yet another assessment stated, "Roosevelt lost the legislative battle, but won the war. His reforms were thereafter upheld by the Supreme Court" (Hall, 1992, p. 204). Describing both the plan and its consequences, another account read:

[T]he ill-conceived court-packing plan of 1937, which, though a tactical failure, was strategically successful in forcing a turnabout in the Court's judicial direction. Beginning with *West Coast Hotel Co. v. Parrish* (1937), the Court accepted state and federal regulatory legislation. (Hall, 1992, p. 584)

Economic conditions during the interval between the two major agricultural Acts also demonstrated the need for curbing agricultural production. Political forces as well as philosophical proclivities of the Secretary of Agriculture, Henry Wallace, also played an important role in developing comprehensive agricultural legislation. The Agricultural Adjustment Act of 1938 emerged from the convergence of several factors, which influenced its construction:

- the failure of the farm acts passed in the wake of the Court's *Butler* decision to effectively curb agricultural production and thus increase prices for farm commodities (Culver & Hyde, p. 176; Leuchtenburg, p. 254).<sup>89</sup>
- the recession of 1937, caused in large part by the retreat by FDR from deficit spending which severely impacted the 25% of Americans engaged in agricultural production, which resulted in a rapid drop in farm prices, a result of both the recession and of overproduction of agricultural commodities (Brogan, p. 554; Culver & Hyde, pp. 176-177; Leuchtenburg, pp. 244-245, 254-255).
- the domination of congressional committees by powerful Southern Democrats (Brogan, p. 554; Leuchtenburg, pp. 186, 252, 255).
- Henry Wallace's desire for the implementation of his concept of an "ever-normal granary" (Brogan, p. 554; Culver & Hyde, pp. 178-179; Leuchtenburg, p. 255).<sup>90</sup>

The Agricultural Adjustment Act of 1938, described as "a complex, unwieldy bill full of compromise and gimmickry" by one source, "gave the farm bloc most of what it wanted" (Culver & Hyde, p. 178; Leuchtenburg, p. 255). The second of the triple A acts

made a start toward an ever-normal granary, established soil conservation as a permanent program, authorized crop loans, offered crop insurance for wheat to give better protection against drought, and empowered the

Secretary of Agriculture to assign national acreage allotments and subsidies to staple farmers. (Leuchtenburg, p. 255)

The last statement regarding “acreage allotments” was not quite true. Instead of acreage allotments, what was assigned were marketing quotas. The probable source of confusion resided in the fact that the marketing quotas were based on a per acre average of commodity production derived from previous years of production. It was this aspect of the new farm bill that drew the legal challenge in *Mulford v. Smith*, an objection that focused on the agricultural commodity known as “flue-cured tobacco” (p. 41).

According to the provisions of the Act, whenever the supply of any farm commodity exceeded the ever-normal granary figure, defined by the Act as the “reserve supply level,” Congress authorized the Secretary of Agriculture to establish a “national marketing quota,” a quota that was to “be apportioned to the farms on which tobacco [was] grown” (p. 41). Regarding the nation’s supply of flue-cured tobacco, the Agriculture Secretary was required to make the determination by November 15th of each year whether the “total supply of tobacco as of July 1st exceeded the reserve supply level which was defined in the Act” (p. 42). If existing supplies exceeded the ever-normal granary level, the Secretary was then required to “proclaim the total supply” by December 1st and announce that “a national marketing quota [would] be in effect throughout the marketing year” that began “the following July 1st” (p. 42). The Act directed that the national marketing quota was to be the amount, as determined by the Secretary, “equal to the reserve supply level” (pp. 42-43).

Embedding a political concept, known as “consent of the governed,” into the Act’s operations as a check on the powers of the Secretary designed to prevent autocratic and dictatorial behavior, the Act required the Secretary “to conduct a referendum of the producers of the crop of the preceding year to ascertain whether they favor[ed] or oppose[d] the imposition of

a quota” (p. 43). The referendum was required to take place “[w]ithin thirty days after [the Secretary’s] proclamation” (p. 43). According to the Act, “If more than one-third oppose, the Secretary is to proclaim the result before January 1st and the quota is not to be effective” (p. 43).

Citizen participation continued after the quota was approved and was described by the Court:

Apportionment of the quota amongst individual farms is to be by local committees of farmers according to standards prescribed in the Act, amplified by regulations and instructions issued by the Secretary. Each farmer is to be notified of his marketing quota and the quotas of individual farms are to be kept available for public inspection in the county or district where the farm is located. If the farmer is dissatisfied with his allotment he may have his quota reviewed by a local review committee, and, if dissatisfied with the determination of that committee, he may obtain judicial review. (p. 44)

These aspects of the Act caused one historian to remark that “the activities of the AAA taught the farmers, far better than the Populists had ever managed, how to unite and organize” (Brogan, p. 554). He further explained:

Under the AAA it was the farmers, meeting and voting, who decided how many acres should be taken out of production every year and supervised each other to make sure that the reduction actually occurred. All the other programmes [sic] were administered in the same manner. By the end of the thirties, the farmers were no longer the desperate clients of Washington: they gave terms to the bureaucracy.<sup>91</sup> (Brogan, p. 554).

The Act further provided penalties for a producers who attempted to market farm commodities in excess of their allotted quotas. When marketed, the “warehouseman” was required to pay the Secretary of Agriculture “a penalty equal to fifty percent of the market prices of the excess” which he was allowed to deduct “from the price paid the producer” (p. 44).

Since Congress didn’t pass the Act until after the November 15th deadline in 1937 for the upcoming year, the Act “provided with respect to the marketing year beginning July 1, 1938, ... that the determination and proclamation of the national marketing quota should be made within fifteen days after the statute’s approval” (p. 43). According to the Court’s summation of events,

which also provided insight to the workings of the Act's requirements, the following actions took place:

The Act was approved February 16, 1938. The Secretary proclaimed a quota for flue-cured tobacco on February 18th and, on the same date, issued instructions for holding a referendum on March 12th. March 25th the Secretary proclaimed the result of the referendum which was favorable to the imposition of a national marketing quota. In June he issued regulations governing the fixing of farm quotas within the states. July 22nd he determined the apportionment as between states and issued regulations relative to the records to be kept by warehousemen and others. Shortly before the markets opened each appellant received notice of the allotment to his farm. (p. 50)

Describing the referendums, one historian noted:

A month later [after the passage of the Act], farmers filed into grange halls and filling stations to ballot on the first AAA referendums under the 1938 act. Cotton farmers approved a compulsory marketing quota by the lopsided tally of 1,189,000 to 97,000; dark-tobacco growers, 38,000 to 9,000; flue-cured growers, 213,000 to 34,000. (Leuchtenburg, p. 255)

James H. Mulford and other flue-cured tobacco farmers in southern Georgia and northern Florida filed suit in the Superior Court of Georgia seeking an injunction "to enjoin warehousemen from deducting, and remitting to the Secretary of Agriculture, the penalties inflicted by the Agricultural Adjustment Act of 1938 on tobacco sold by the plaintiffs in excess of the quotas assigned to their respective farms" (p. 40). Nat Smith and the other "tobacco warehousemen [were] doing business in Valdosta, Ga" (24 F. Supp. 919, 920). The Georgia state court "granted a preliminary injunction and ordered the defendant warehousemen to pay the amounts of the penalties into the registry of the court" (p. 45). Attorneys for the warehousemen succeeded in removing the case to the U.S. District Court for the Middle District of Georgia, which continued the injunction while modifying the state court's order so that payments would be made to the federal district court instead of the state court. At this point the federal government "was permitted to intervene as a defendant" (p. 45). A three-judge panel, after



hearing the case, dismissed “the bill” filed by the tobacco growers (p. 46). The federal District Court for the Middle District of Georgia also “adjudged [costs] against the plaintiffs,” (24 F. Supp. 919, 924). Upon appeal, the case was argued before the U.S. Supreme Court on March 8, 1939 (p. 38).

Attorneys for the tobacco producers argued in much the same vein as the attorneys had argued in successfully challenging the constitutionality of the first AAA. The arguments centered on the Tenth Amendment, on unlawful delegation of legislative power, and on the due process requirements of the Fifth Amendment. First, they argued, the Act was “a statutory plan to control agricultural production,” which was “beyond the powers delegated to Congress,” which powers had been reserved to the States by the Tenth Amendment (p. 47). Second, the Act’s “standard for calculating farm quotas [was] uncertain, vague, and indefinite, resulting in an unconstitutional delegation of legislative power to the Secretary” (p. 47). Finally, the Act took the tobacco producers’ 1938 crop “without due process of law” (p. 47). While not elaborated by the Court nor specified in its legal reasoning, one may surmise that arguments presented by the Government’s attorneys were similar to those used by the Court in explaining its official decision.

Justice Owen Roberts, author of the *Butler* opinion invalidating the first AAA, authored this opinion, which upheld the constitutionality of the second AAA. The opinion for the 7-2 Court majority, in effect, said the *Butler* opinion was a mistake by the Court, that “the problems confronting agriculture were national in scope and required national legislative attention” (Hall, 1992, p. 563). Justice Roberts was joined by Chief Justice Hughes and Justices Stone, Frankfurter, Reed, Black, and Douglas. As mentioned previously, *Mulford v. Smith* marked Justice Douglas’ inaugural appearance on the Court. Justices Butler and McReynolds, the last

remaining members of the Four Horsemen, joined in a dissenting opinion authored by Butler, which followed the line of reasoning previously laid out by the Court majority in *United States v. Butler*.

Whereas the *Butler* Court framed the issue around the figure of the *effects* of the law, i.e., the regulation of agricultural production, the *Mulford* Court framed the issue around the figure of *congressional authority to regulate commerce*, thus relegating the regulatory effects of the law to ground, in terms of Gestalt figure-ground perception theory. According to the *Mulford* Court, “The statute does not purport to control production” (p. 47). The Court explained:

It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce, - the marketing warehouse. (p. 47)

The Court had earlier summarized the portion of the Act containing a congressional finding, which undergirded both congressional authority for and the purpose of the Agricultural Adjustment Act of 1938. According to the Court:

Section 311 is a finding by the Congress that the marketing of tobacco is a basic industry which directly affects interstate and foreign commerce; that stable conditions in such marketing are necessary to the general welfare; ... that without federal assistance the farmers are unable to bring about orderly marketing, with the consequence that abnormally excessive supplies are produced and dumped indiscriminately on the national market; that this disorderly marketing of excess supply burdens and obstructs interstate and foreign commerce, causes reduction in prices and consequent injury to commerce; ... and that the establishment of quotas as provided by the Act is necessary and appropriate to promote, foster and obtain an orderly flow of tobacco in interstate and foreign commerce. (p. 42)

Regarding the attempt by the tobacco growers to assert the Tenth Amendment as a limit on the Commerce Power of Congress, the Court held, “The provisions of the Act under review

constitute a regulation of interstate and foreign commerce within the competency of Congress under the power delegated to it by the Constitution” (p. 48).

Addressing the claim that the Act unconstitutionally delegated legislative authority to the Secretary of Agriculture, the Court declared that its summarization of the Act’s provisions disclosed “that definite standards are laid down for the government of the Secretary, first, in fixing the quota and, second, in its allotment amongst states and farms” (p. 48). The Court further noted the following:

The Congress has indicated in detail the considerations which are to be held in view in making these adjustments, and in order to protect against arbitrary action, has afforded both administrative and judicial review to correct errors. This is not to confer unrestrained arbitrary power on an executive officer.  
(p. 49)

The Court announced its ruling, “In this aspect the Act is valid within the decisions of this Court respecting delegation to administrative officers” (p. 49). In a footnote, the Court indicated the controlling cases regarding “delegation to administrative officers:”

*United States v. Grimaud*, 220 U.S. 506; *Avent v. United States*, 266 U.S. 127; *Hampton & Co. v. United States*, 276 U.S. 394; *New York Central Securities Corp. v. United States*, 287 U.S. 12; *Currin v. Wallace*, [306 U.S. 1]. (p. 49, n. 20)

Finally, in response to the tobacco growers’ assertion that they were being deprived of their property in contravention of the Fifth Amendment’s due process requirements because they had already planted their tobacco crops before the Act became law, the Court responded by noting the flawed reasoning used by the growers’ attorneys:

The argument overlooks the circumstance that the statute operates not on farm production, as the appellants insist, but upon the marketing of their tobacco in interstate commerce. The law, enacted in February, affected the marketing which was to take place about August 1st following, and so was prospective in its operation upon the activity it regulated. (p. 51)

The Court pointed out further actions that the growers could have taken in compliance with the Agricultural Adjustment Act of 1938 that would have avoided the Act's marketing penalties.

According to the Court:

The Act did not prevent any producer from holding over the excess tobacco produced, or processing and storing it for sale in a later year; and the circumstance that the producers in Georgia and Florida had not provided facilities for these purposes is not of legal significance. (p. 51)

Thus, the Court affirmed the decision of the U.S. District Court for the Middle District of Georgia that had dismissed the tobacco growers' challenge to the constitutionality of the second Agricultural Adjustment Act.

*Significance for the tenth amendment.*

*Mulford v. Smith* was one of a series of cases sandwiched between *NLRB v. Jones & Laughlin Steel Corporation* and *United States v. Darby Lumber Company* that legitimized Government regulation of the nation's economic life under the Commerce Clause of the Constitution by removing the Tenth Amendment as a bar to such regulation. These cases also "systematically dismantled the entire structure of laissez-faire constitutionalism" (Hall, 1992, p. 584). Laissez-faire constitutionalism was based on a set of beliefs that included hostility to government regulation of economic activities, a "commitment to market control of the economy," and the conviction that social Darwinism (a pernicious view of life as a socioeconomic competition that ensures survival of the economically strongest with a corollary belief, derived from Protestant predetermination, that a person's resulting station in life is ordained from above) best explained life (Hall, 1992, p. 492). By reinterpreting the Commerce Clause to include activities related to production, the Court expanded the reach of the nation's power to regulate commerce. Since production was no longer viewed as lying outside of interstate or foreign commerce, nor was it deemed to be solely a function of the State's police

powers, the Tenth Amendment could not come into play since neither its text nor case law viewed the Tenth Amendment as a limit on a delegated power. While the *Butler* decision seemed to indicate the latter view, the *Mulford* Court decisively repudiated it as a mistaken view.

***South Dakota v. Dole, 483 U.S. 203 (1987).***

*Case summary.*

The Court's report of this case did not contain separate sections for attorney arguments by either appellant or appellee. Neither did the opinion elaborate on the two opposing sides' legal arguments except for the arguments regarding the Twenty-first Amendment. Although the Court presented South Dakota's arguments regarding the applicability of the Twenty-first Amendment to the fourth conditional spending test used by the Court, the opinion did not present the Government's argument regarding that issue. Instead the Court responded to South Dakota's arguments with its own argument. As a result the shorter brief format was used.

The subject matter involved the minimum drinking age, a requirement which varied among the states. *South Dakota v. Dole* also involved a congressional desire to establish a national minimum drinking age, a condition of which it subsequently attached to a bill allocating federal highway funds to the various states. The constitutional issues implicated the Twenty-first Amendment and the Spending Clause contained in Article I, § 8, cl. 1 of the Constitution. The name of the case derived from the two parties involved, the State of South Dakota and the United States Secretary of Transportation, Elizabeth Dole.

Many are familiar with § 1 of the Amendment, which repealed the Eighteenth Amendment's prohibition on the manufacture, sale, and transportation of intoxicating liquor and that also provided authorization for the Volstead Act by which Congress banned the consumption of beer, wine, and distilled liquor across the nation. Many, however, are not

familiar with § 2 of the Twenty-first Amendment that re-established state control of alcoholic beverages. § 2 of the Twenty-first Amendment reads, “The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” As one journalist summarized the implications of § 2 of the Twenty-first Amendment:

The Supreme Court has ruled that Section 2, although it doesn’t specifically say so, gives the states extensive authority to regulate alcoholic beverages. Normally, states would be prohibited by the Commerce Clause from restricting the transport of alcoholic beverages in interstate commerce. However, the Court has also held that states may only regulate alcohol in order to control consumption, not for economic protectionism. (Monk, p. 247)

South Dakota was one of the states that permitted “persons 19 years of age or older to purchase beer containing up to 3.2% alcohol” (p. 205). One result of the lower drinking age in South Dakota was that young people in nearby states with higher minimum drinking ages drove into South Dakota where they could both purchase and consume beer legally. The President appointed a commission “to study alcohol-related accidents and fatalities on the Nation’s highways” and “concluded that the lack of uniformity in the States’ drinking ages created ‘an incentive to drink and drive’ because ‘young persons commut[e] to border States where the drinking age is lower’” (p. 209). In 1984 Congress tacked on § 158 to a law allocating federal highway funds to the various states. § 158 directed

the Secretary of Transportation to withhold a percentage [5%] of federal highway funds otherwise allocable from States “in which the purchase or public possession ... of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.” (p. 205)

South Dakota initiated a lawsuit in federal District Court for the District of South Dakota in order to obtain “a declaratory judgment that § 158 violate[d] the constitutional limitations on congressional exercise of the spending power and violate[d] the Twenty-first Amendment to the

United States Constitution” (p. 205). The U.S. District Court ruled against South Dakota’s request for the requested declaratory judgment and upheld the legitimacy of § 158. Upon appeal the Eighth Circuit Court of Appeals affirmed the District Court’s ruling, whereupon South Dakota successfully appealed to the U.S. Supreme Court.

Chief Justice Rehnquist delivered the opinion for the 7-2 Court, which held that § 158 represented “a valid use of the spending power” (p. 203). Joining the Chief Justice were Justices Blackmun, Marshall, Powell, Scalia, Stevens, and White. Justices Brennan and O’Connor filed separate dissenting opinions.

The Court first directed attention to opposing arguments regarding the applicability of the Twenty-first Amendment to the legal dispute under consideration. According to the Court, the Attorney General of South Dakota cited *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980), a case in which the Court held “that the ‘Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system’” (p. 205). South Dakota then “assert[ed] that the setting of minimum drinking ages [was] clearly within the ‘core powers’ reserved to the States under § 2 of the Amendment” (p. 205). Finally, South Dakota claimed that § 158 of the federal transportation bill “usurp[ed] that core power” that had been reserved to the states by § 2 of the Twenty-first Amendment (pp. 205-206).

In response to the South Dakota Attorney General’s argument, the Deputy Solicitor General denied that § 158 contravened the Twenty-first Amendment. Instead, the Government continued, § 2 of the Amendment “confirm[ed] the States’ broad power to impose restrictions on the sale and distribution of alcoholic beverages but [did] not confer on them any power to *permit* sales that Congress [sought] to *prohibit*” (Emphasis in original) (p. 206). As the Court opined,

that reasoning would permit Congress to enact “a national minimum drinking age more restrictive than that provided by the various state laws” (p. 206). And then the Court announced that it wouldn’t be basing its ruling on the “meaning of the Twenty-first Amendment, the bounds of which have escaped precise definition” (p. 206). According to the Court:

Despite the extended treatment of the question by the parties, however, we need not decide in this case whether that Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age. Here, Congress has acted indirectly under its spending power to encourage uniformity in the States’ drinking ages. As we explain below, we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly. (p. 206)

So, instead of determining whether the Twenty-first Amendment prevented Congress from enacting a minimum drinking age under the Commerce Clause of the Constitution, the Court selected the Spending, or the General Welfare, Clause as the controlling constitutional authority in the legal dispute between South Dakota and the U.S. Government. After quoting the relevant portion of the Clause as contained in Article I, § 8, cl. 1 of the Constitution, the Court observed:

Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power “to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.). (p. 206)

The Court continued its focus on the Spending Clause by citing from and commenting on the Court’s ruling in *Butler*:

The breadth of this power was made clear in *United States v. Butler* ... where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.” Thus, objectives not thought to be within Article I’s “enumerated legislative fields,” *id.*, at 65,



may nevertheless be attained through the use of the spending power and the conditional grant of federal funds. (p. 207)

So, while it was possible that Congress couldn't directly legislate to establish a national minimum drinking age, it was possible to attain the same result though conditional spending.

Remarking that the "spending power" was "not unlimited," the Court next proceeded to lay out the "several general restrictions articulated in our cases" (p. 207). The first requirement was "derived from the language of the Constitution itself; the exercise of the spending power must be in pursuit of 'the general welfare.' See *Helvering v. Davis*, 301 U.S. 619, 640-641 (1937); *United States v. Butler*, *supra*, at 65" (p. 207). In determining if "a particular expenditure" meets this requirement, "courts should defer substantially to the judgment of Congress. *Helvering v. Davis*, *supra*, at 640, 645" (p. 207). In the current case, the Court ruled that § 158 was "designed to serve the general welfare" (p. 208).

The second requirement for successful attachment of spending conditions to legislation emerged from the case, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). According to the Court, "[W]e have required that if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously ..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation'" (p. 207). In *South Dakota v. Dole*, the Court declared that the "conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress" as was done in § 158 (p. 208).

The third requirement derived from the case, *Massachusetts v. United States*, 435 U.S. 444, 461 (1978), which, in turn, cited *Ivanhoe Irrigation Dist. V. McCracken*, 357 U.S. 275, 295 (1958). As the Court articulated the general rule, "conditions on federal grants" needed to be related "to the federal interest in particular national projects or programs" (p. 207). The Court observed that this rule was "without significant elaboration" (p. 207). Commenting further, the

Court pointed out that South Dakota was not “challenging the germaneness of the condition [§ 158’s requirement regarding the minimum drinking age] to federal purposes” (p. 208). In a separate note, the Court explained, “Our cases have not required that we define the outer bounds of the ‘germaneness’ or ‘relatedness’ limitation on the imposition of conditions under the spending power” (p. 208, n. 3).

The fourth and final Court-enumerated requirement was stated somewhat differently, the difference arising from a shift away from what requirement must be met to consideration of other constitutional requirements that might act as “an independent bar to the conditional grant of federal funds” (p. 208). The Court also described the fourth requirement as the possible existence of an “‘independent constitutional bar’ limitation on the spending power” (p. 209). The Court cited three cases in support of the final requirement: “*Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 269-270 (1985); *Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (*per curiam*);” and “*King v. Smith*, 392 U.S. 309, 333, n. 34 (1968)” (p. 208).

Although the Court only enumerated four restrictions on congressional spending power, it noted another requirement later in the opinion. According to the Court:

Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which “pressure turns into compulsion.” *Steward Machine Co. v. Davis*, [301 U.S. 548 (1937)], at 590. (p. 211)

Since South Dakota would lose only “5% of the funds otherwise obtainable under specified highway grant programs” if it wished to maintain its minimum drinking age of 19, the Court noted that “the argument as to coercion is shown to be more rhetoric than fact” (p. 211).

Of the first three requirements listed, the Court pointed out that “South Dakota [did] not seriously claim that § 158 [was] inconsistent with any of the first three restrictions mentioned” (p. 208). Instead, “the basic point of disagreement” between South Dakota and the Federal

Government centered on the fourth requirement as to “whether the Twenty-first Amendment constitute[d] an ‘independent constitutional bar’ to the conditional grant of federal funds” (p. 209). The Court noted the South Dakota Attorney General’s argument, observing that the State relied “on its view that the Twenty-first Amendment prohibit[ed] *direct* regulation of drinking ages by Congress” (Emphasis in original) (p. 209). Accordingly, South Dakota “assert[ed] that ‘Congress may not use the spending power to regulate that which it is prohibited from regulating directly under the Twenty-first Amendment’” (p. 209). In response, the Court presented a questionable assertion:

But our cases show that this “independent constitutional bar” limitation on the spending power is not of the kind petitioner suggests. *United States v. Butler*, *supra*, at 66, for example, established that the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly. (p. 209)

The problem arose from the Court’s interpretation of *Butler* as establishing “less exacting” “constitutional limitations on Congress” when Congress chose to use “its spending power” rather than its power to directly regulate an activity as derived from one of its other constitutional sources of federal action (p. 209). What the *Butler* Court actually said was that the Spending Clause served as the source of congressional spending authority and, as such, “the power of Congress to authorize expenditure of public moneys for public purposes [was] not limited by the direct grants of legislative power found in the Constitution” (297 U.S. 1, 66). As such, the limits on the spending authority of Congress were contained in the Spending Clause, which stated Congress had the power “to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States” (Article I, § 8, cl. 1). The *Butler* Court did not directly confront the issue of conditional spending, which is a special case of the spending power of Congress with its own set of requirements. What the *Butler* Court actually addressed was the issue of

congressional authority to spend money “for public purposes” as required by the Spending Clause, not the attachment of conditions to money bills. Whereas the spending power is restricted only by the three stipulations regarding debts, national defense, and the national welfare, conditional spending must meet four additional requirements in order to pass legal muster. In effect, the Rehnquist Court sidestepped the issue of the fourth requirement of conditional spending, that being the stipulation that such legislation should not violate an existing “independent constitutional bar” by its use of a questionable assertion regarding *Butler* (p. 209).

The Court did, however, continue to discuss other cases that dealt with the constitutional bar requirement. Citing a Tenth Amendment challenge in 1947 to the Hatch Act’s requirement that prohibited political activities by state officials “financed in whole or in part with federal funds,” the Rehnquist Court noted that the Court had held in *Oklahoma v. Civil Service Comm’n*, 330 U.S. 127 (1947) “that the Federal Government ‘does have power to fix the terms upon which its money allotments to states shall be disbursed.’ *Id.*, at 143” (p. 210). In that case, the Rehnquist Court observed, the Supreme Court found no contravention of the Tenth Amendment “because the State could, and did, adopt ‘the simple expedient of not yielding to what she [regarded was] federal coercion’” (p. 210). The Rehnquist Court quoted from the 1947 Court’s ruling, “The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual” (p. 210). Summarizing its review of *Oklahoma v. Civil Service Comm’n* and dicta selected from *Steward Machine Co. v. Davis*, the Rehnquist Court interpreted the meaning of the “independent constitutional bar” requirement:

These cases establish that the “independent constitutional bar” limitation on the spending power is not, as petitioner [South Dakota] suggests, a

prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, *we think* that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. (Emphasis added) (p. 210)

Applying its interpretation of the constitutional bar requirement, the Rehnquist Court opined, “Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State’s action in so doing would not violate the constitutional rights of anyone” (p. 211). In other words, the constitutional bar does not restrict congressional action; instead, it must be applied to the exercise of the condition by the subsequent parties in accepting the condition.

After discussing the additional “coercive nature” requirement, the Rehnquist Court summarized its determination of the intersection of facts and legal issues in announcing its ruling. In affirming the Eighth Circuit Court of Appeals judgment in *South Dakota v. Dole*, the Court stated:

Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power. (pp. 211-212)

Both Justices Brennan and O’Connor dissented, each of them authoring their own opinion. Both Justices believed the Twenty-first Amendment acted as a restraint on federal power, a belief not shared by the Court majority who viewed the Amendment through the lens of the constitutional bar requirement for conditional spending. Viewing it through that lens, the majority Justices viewed the Amendment as applying to actions taken by those accepting the conditions offered by Congress. Justice Brennan’s dissent consisted of a paragraph in which he

stated his belief “that regulation of the minimum age of purchasers of liquor falls squarely within the ambit of those powers reserved to the States by the Twenty-first Amendment” (p. 212). In Justice Brennan’s view, “[t]he Amendment, itself, [struck] the proper balance between federal and state authority” (p. 212). Justice Brennan viewed § 158 as violating the constitutional bar requirement for successful attachment of spending conditions on the receipt of federal funds. According to the Justice, “Since States possess this constitutional power, Congress cannot condition a federal grant in a manner that abridges this right” (p. 212).

Justice O’Connor thought § 158 violated the third requirement of conditional spending as discussed by the majority opinion, the stipulation whereby the conditions needed to reasonably relate “to the federal interest in the project” (p. 208). According to Justice O’Connor, “...§ 158 is not a condition on spending reasonably related to the expenditure of federal funds and cannot be justified on that ground” (p. 212). Justice O’Connor explained:

But the Court’s application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and unconvincing. We have repeatedly said that Congress may condition grants under the spending power only in ways reasonably related to the purpose of the federal program. *Massachusetts v. United States*, *supra*, at 461; *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S., 275m 295 (1958)...; *Steward Machine Co. v Davis*, *supra*, at 590... In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose. (pp. 213-214)

Furthermore, according to Justice O’Connor, the majority Justices were mistaken when they stated “that South Dakota conceded the reasonable relationship point” (p. 214). Justice O’Connor elaborated:

In support of its contrary conclusion, the Court relies on a supposed concession by counsel for South Dakota that the State “has never contended that the congressional action was ... unrelated to a national concern in the absence of the Twenty-first Amendment.” (p. 214)

Justice O'Connor continued:

The fact that the Twenty-first Amendment is crucial to the State's argument does not, therefore, amount to a concession that the condition imposed by § 158 is reasonably related to highway construction. The Court also relies on a portion of the argument transcript in support of its claim that South Dakota conceded the reasonable relationship point. (p. 214)

In her next two sentences, Justice O'Connor supplied new information by establishing a nexus between the Court's faulty reasoning, the unpreparedness of the South Dakota Attorney General to discuss the reasonable relationship requirement for the successful attachment of spending conditions upon receipt of federal funds, and an *Amici Curiae* brief submitted by attorneys for the National Conference of State Legislatures that contained extensive arguments about the reasonable relationship requirement. According to Justice O'Connor:

But counsel's [the Attorney General for South Dakota] statements there [the argument transcript] are at best ambiguous. Counsel essentially said no more than that he was not prepared to argue the reasonable relationship question discussed at length in the Brief for the National Conference of State Legislatures et al. as *Amici Curiae*. (p. 214)

Continuing to hammer at the unrelatedness of highway construction to the establishment of a minimum drinking age, Justice O'Connor argued the following:

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced. (p. 215)

And then, Justice O'Connor proposed what initially appeared to be a sixth requirement for the attachment of spending conditions, but in actuality represented further clarification of the reasonable relationship requirement that had been articulated by attorneys "Benna Ruth Solomon, Beate Bloch, and Larry L. Simms" in the brief they submitted on behalf of the

National Conference of State Legislatures (p. 204). This brief was the one referred to earlier as containing an argument on “the reasonable relationship question discussed at length,” but which the South Dakota Attorney General indicated in oral argument with the Court that he “was not prepared to argue” (p. 214). This brief is also the one to which the Court referred when it stated:

*Amici* urge that we take this occasion to establish that a condition on federal funds is legitimate only if it relates directly to the purpose of the expenditure to which it is attached. See Brief for National Conference of State Legislatures et al. as *Amici Curiae* 10. (p. 208, n. 3)

Continuing its comments regarding *Amici Curiae* 10 (which further illuminate the nexus drawn by Justice O’Connor between the Court’s reasoning, the unpreparedness of the SD Attorney General to argue the reasonable relationship requirement, and the *Amici Curiae* 10 brief), the Court further stated:

Because petitioner has not sought such a restriction, see Tr. of Oral Arg. 19-21, and because we find any such limitation on conditional federal grants satisfied in this case in any even, we do not address whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power. (p. 208, n. 3)

Although the Court elected to “not address” this aspect of the reasonable relationship question, Justice O’Connor elected to address the issue because of what she perceived to be its central bearing on the case (p. 208, n. 3). First, Justice O’Connor introduced the idea of a new demarcation line dividing acceptable and unacceptable conditions on receiving and spending federal funds by stating:

There is a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants. It is the line identified in the Brief for the National Conference of State Legislatures et al. as *Amici Curiae*... (p. 215)

Justice O’Connor then quoted the following two paragraphs from the cited brief:

Congress has the power to *spend* for the general welfare, it has the power to *legislate* only for delegated purposes...



The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers. (Emphasis in original) (p. 216)

According to Justice O'Connor, § 158 represented "an attempt to regulate the sale of liquor, an attempt that lies outside Congress' power to regulate commerce because it falls within the ambit of § 2 of the Twenty-first Amendment" (p. 212).

In O'Connor's view, three classes of conditions existed under the reasonable relationship requirement for conditional spending. The dividing line consisted of the question posed by the attorneys for the National Conference of State Legislatures asking whether the spending requirement "specifie[d] in some way how the money should be spent" or instead "a regulation" that was "valid only if it [fell] within one of Congress' delegated regulatory powers" (p. 216). Accordingly, the first class consisted of those conditions which appropriately related "to how federal moneys were to be expended" (p. 217). The example Justice O'Connor provided was the case cited by the Court majority, *Oklahoma v. Civil Service Comm'n*, which involved the Hatch Act's applicability to state officials funded by federal dollars.

The second class comprised those conditions that regulated but the regulation could be "independently justified under some regulatory power of Congress" (p. 217). Justice O'Connor provided two examples. *Fullilove v. Klutznick*, 448 U.S. 448 (1980) "upheld a condition on federal grants that ... money be 'set aside' for contracts with minority enterprises" because it was "a valid regulation under the commerce power and § 5 of the Fourteenth Amendment" (p. 217). *Lau v. Nichols*, 414 U.S. 563 (1974), upheld "nondiscrimination provisions" that were

“applied to local schools receiving federal funds” because the condition was a valid regulation as well.

The third class contained those conditions “fall[ing] into neither class,” which was the situation posed by the current case, *South Dakota v. Dole*. In other words, the condition didn’t relate to how the money should be spent and instead represented a regulation, but it was a regulation that lay outside of Congress’ delegated powers. Justice O’Connor commented:

[A] condition that a State will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction. The only possible connection, highway safety, has nothing to do with how the funds Congress has appropriated are expended. Rather than a condition ..., it is a regulation determining who shall be able to drink liquor. As such it is not justified by the spending power. (p. 218)

Having demonstrated that § 158 didn’t belong to the first class of reasonable relationship requirement conditions, but to either the second or third class of conditions that regulated, Justice O’Connor examined the question further to determine a possible source of constitutional authority for the regulation.

Of the other possible sources of congressional authority for regulating the sale of liquor only the commerce power comes to mind. But in my view, the regulation of the age of the purchasers of liquor, just as the regulation of the price at which liquor may be sold, falls squarely within the scope of those powers reserved to the States by the Twenty-first Amendment. (p. 218)

According to Justice O’Connor, the Twenty-first Amendment prohibited Congress from using the Commerce Clause to regulate the minimum drinking age across the nation. Under the Spending Clause, the regulatory character of § 158, viewed through the reasonable relationship requirement for conditional spending, also failed to find constitutional authority. Because § 158 could not be justified by either the spending power or the commerce power, it was “not authorized by the Constitution” and the Court erred “in holding it to be the law of the land” (p. 218).

*Significance for the tenth amendment.*

*South Dakota v. Dole*'s significance lies in its exposition, both in the majority and dissenting opinions, of the five requirements that need to be met in order for conditions to be legally attached to the receipt and expenditure of federal funds. These requirements, which must be met for the successful attachment of conditions to congressional spending bills, are listed below in the order in which the Court presented them:

- General Welfare Requirement.
- Unambiguous Conditions Requirement.
- Relevant Relationship Requirement.
- Absence of a Constitutional Bar Requirement.
- Absence of Financial Coercion Requirement.

Succeeding Courts may differ in how they apply the requirements (especially the constitutional bar, the reasonable relationship, and the financial coercion tests as those have not been clearly defined by the Court) to the specifics of particular pieces of legislation. For example, neither *South Dakota v. Dole* (1987) nor *Steward Machine Co. v. Davis* (1937) (the latter case being cited by the Court as the source of the requirement) provided any clarification about the line between persuasion and coercion. As a result questions continue about the practical applicability to subsequent legislation of the “not coercive” requirement for conditional spending. In this particular case, a loss of 5% of a state’s allocation of federal funds for noncompliance with federal conditions placed the statute’s conditions on spending in the persuasive, and not the coercive, category.

Observers are also left wondering what might have been the outcome of the case had the Attorney General for South Dakota been prepared to argue the Relevant Relationship

Requirement, an issue inquired about by the Court during oral argument. As it was, the different interpretations placed upon that exchange between the Court and the South Dakota Attorney General marked a fundamental point of separation between the Court's majority opinion and Justice O'Connor's dissent (for the exchange between the Court and the SD Attorney General, see Appendix P). The issue regarding the Relevant Relationship Requirement also formed the heart of the *Amici Curiae* brief submitted by attorneys for the National Conference of State Legislatures, a brief that was cited by both Justice Rehnquist in the majority opinion and Justice O'Connor in her dissenting opinion (for both the "Table of Contents" and the "Summary of Argument" sections contained in the brief, see Appendix Q).

Finally, *South Dakota v. Dole* provided us with a flow chart, as it were, of the Spending Power of Congress in terms of hierarchical propositions within a logical framework. These propositions (in descending order according to their hierarchical position in a logical reasoning structure that proceeds from the general power to more specific applications of that power) will be presented as they were discussed in *South Dakota v. Dole* by both Chief Justice Rehnquist's majority opinion and Justice O'Connor's dissenting opinion. First, *United States v. Butler* established the proposition "that the reach of the spending power 'is not limited by the direct grants of legislative power found in the Constitution'" (O'Connor, J., in dissent) (pp. 212-213). As the Court explained, *United States v. Butler* resolved "a longstanding debate over the scope of the Spending Clause" (Rehnquist, C.J., for the Court) (p. 207).

Second, Court rulings established the proposition that "Congress may attach conditions on the receipt of federal funds to further 'the federal interest in particular national projects of programs'" (O'Connor, in dissent) (p. 212). Or, as explained by Chief Justice Rehnquist:

Incident to this power [the Spending Power as articulated in Article I, § 8, cl. 1 of the Constitution], Congress may attach conditions on the receipt of

federal funds, and has repeatedly employed the power “to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.). (p. 206)

The cases cited by Rehnquist’s majority and O’Connor’s dissenting opinions, while both agreeing on the foundational status of *Steward Machine Co. v. Davis* (1937) and *Oklahoma v. Civil Service Commission* (1947), differed beyond that point. Justice O’Connor further cited only the case, *Massachusetts v. United States* (1978), while the Chief Justice, in addition to having already cited *Fullilove v. Klutznick* in the passage quoted above, also cited the following two cases, *Ivanhoe Irrigation District v. McCracken* (1958) and *Lau v. Nichols* (1974). These cases represent the case law bearing on the proposition that Congress may, under its Spending Power, attach conditions to the receipt and expenditure of federal funds. *South Dakota v. Dole* also interpreted *United States v. Butler* to support the following corollary to the proposition that Congress could use the Spending Power to attach conditions upon how federal funds are spent: “Thus objectives not thought to be within Article I’s ‘enumerated legislative fields’ ... may nevertheless be attained through the use of the spending power and the conditional grant of federal funds” (Rehnquist, C.J., for the Court) (p. 207).

Third, a series of Court rulings established the proposition that “the spending power is ... subject to several general restrictions” (Rehnquist, C.J., for the Court) (p. 207). Or, as articulated by Justice O’Connor’s dissent, “[T]here are four separate types of limitations on the spending power” (O’Connor, J., in dissent) (p. 213). For unexplained reasons, Justice O’Connor did not include the fifth restriction noted by the Court majority regarding the Absence of Financial Coercion Requirement. However, as noted previously, the lines of demarcation between

acceptable and unacceptable conditions regarding the five requirements of conditional spending have not been fully delineated by the Court regarding some of the requirements.

### **Summary of Salient Points**

A number of critical threads composing the tapestry of American government were uncovered during this chapter's investigation of Tenth Amendment case law. This most likely occurred because the major arguments over sovereignty and over the location of the state-federal boundaries involved the federalism issues inherent in the Tenth Amendment. These threads included the identification of two great forces moving throughout our nation's history, sometime in harmony, sometimes clashing against each other in ways that revealed an ancient rift between local and central government sovereignty issues. The case law emerging from this clash of forces duplicated in many respects the political discussions and arguments that preceded the courtroom battles. This chapter revealed much of the preceding political battle in an attempt to provide a deeper understanding of the subterranean forces at work in the visible courtroom clashes. Wherever possible, contextual information was also presented in recognition of its importance as an aid to increased understanding.

Individual strands within the thread of disputed sovereignty included two different types of actions, both by the same man, James Madison. One Madison was the statesman viewed by George Washington as the person who best "understood the nature of the new" constitutional republic, the man who authored the Virginia Plan that underlies much of the Constitution, the man who co-authored significant portions of *The Federalist* in collaboration with Hamilton and Jay (Wills, 2002, p. 42). The other Madison was the petty politician finally adjudged by Washington to be "duplicitous and dishonorable," a man so caught up in partisan politics that winning one's argument justified abandoning principled positions (Wills, 2002, p. 43).

Madison's behavior particularly illustrates an observation drawn centuries earlier by Aristotle, who observed:

[T]o invest a man [with the authority of government] is to introduce a beast, as desire is something bestial and even the best of men in authority are liable to be corrupted by anger. We may conclude then that the law is intelligence without passion and is therefore preferable to any individual. (Aristotle, Book III, ch. xvi; Wellton, p. 154)

So, on the one hand, we have Madison the individual who became "corrupted by anger," possessed of "bestial" desires for victory at any cost (Aristotle, Book III, ch. xvi; Wellton, p. 154). On the other hand, we have Madison the statesman focused on the primacy of law and of "intelligence without passion" (Aristotle, Book III, ch. xvi; Wellton, p. 154). Madison's actions in the Constitutional Convention and in his collaborative writing of *The Federalist* were focused on the rule of law, on how best to structure government as a means of ensuring the rule of law in America. Madison's multiple actions in opposition to Hamilton, to the retention of the nation's capital in Philadelphia, to Jay's Treaty, and to the Alien and Sedition Acts were so focused on achieving victory for his viewpoint that the end (winning) justified the abandonment of principled positions that had been reached through a focus on a government ruled by law.

In addition to the thread of disputed sovereignty, the thread representing the political and legal thought of Alexander Hamilton ran throughout the case law contained in this chapter. One strand in particular, regarding the use of constitutionally implied powers to reach a constitutionally authorized end, cropped up in multiple Court opinions that were examined. Following Hamilton's initial authorship in his opinion regarding the constitutionality of the Bank Bill in President Washington's first administration, Chief Justice Marshall used Hamilton's thought in *McCullough v. Maryland*. Later, the same thought reappeared in *United States v. Darby* and again in *Heart of Atlanta Motel v. United States*. Other strands of the Hamiltonian

thread involved views of the Constitution as flowing from the sovereignty of the people instead of flowing from a compact made by the states, of the Constitution as a general blueprint instead of a detailed plan or comprehensive legal code, and most importantly, Hamilton's views regarding judicial review. In addition to revealing that the majority of articles contained in *The Federalist* were authored by Alexander Hamilton, this chapter also drew attention to Hamilton's authorship of the articles focused on the judiciary.

Another thread discovered in this chapter's represented the various answers given in our nation's history to an ancient question first posed by Aristotle more than two millennia previously. Discussing the question posed by Aristotle in chapters xv-xvi of Book III in his *Politics*, one of America's renowned constitutional scholars (Professor Edward S. Corwin, Princeton University) identified Aristotle's question as asking, "whether the rule of law or the rule of an individual is preferable," which had been interpreted in 1708 by an English political theorist (James Harrington, in his *The Commonwealth of Oceana*) to read "[whether a] government of laws and not of men [is preferable]" (Corwin, 1965, p. 8).

The first American response to Aristotle's question was supplied on January 9, 1776, by Thomas Paine in his pamphlet, *Common Sense* (Liell, p. 83; Corwin, 1965, p. 1). Calling for a "Continental Conference" to write a "Continental Charter ... of the United Colonies," Paine described the status that should be accorded the American successor to England's Magna Carta (Paine, p. 33):

But where says some is the King of America [sic]? I'll tell you Friend, he reigns above, and doth not make havoc of mankind like the Royal Brute of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God, let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute



governments the King is law, so in free countries the law *ought* to be King; and there ought to be no other. (Emphasis in original) (Paine, p. 34)

Some six months later, the Declaration of Independence implied America's second response to Aristotle's question through its discussion of "unalienable Rights," the purpose of government being to "secure these rights," the source of government being "the consent of the governed," and its detailed listing of tyrannical abuses by an individual (the King of England) which denied colonists the rule of law (The Declaration of Independence). While not explicitly stating that the rule of law was preferable to the rule of men, the effect of the arguments presented in the Declaration of Independence stated a preference for the rule of law.

The third American response to the ancient question posed by Aristotle appeared in the Massachusetts Constitution of 1780, which was written in response to perceived legislative tyranny by several early state legislatures following the practice of the British parliamentary model, a response authored by John Adams to embed the institutional practice of Montesquieu's doctrine regarding governmental separation of powers into the state constitution. Without the response being a government of laws, and without that response being wedded to the doctrine of Separation of Powers, judicial review would either have not emerged or its form would have been vastly different than is the current state of affairs in American life.

The Constitutional Convention of 1787, the collection of essays entitled *The Federalist*, the ratifying conventions in the various states, and the ratification of the U.S. Constitution combined to provide the fourth American response to Aristotle's question. Vesting sovereignty in the people, dividing government responsibilities between three branches of government, creating a unique federalist form of government, establishing rules by which its legislators and head executives would be chosen, and laying out the set of rules under which the nation would

be governed, the Constitution declared that American government would be based on the rule of law when it declared:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (U.S. Constitution, Article VI)

America's fifth assertion that the rule of law is preferable to the rule of men was implied by President Lincoln's Gettysburg Address when he declared "that government of the people, by the people, for the people, shall not perish from the earth" (Lincoln's Gettysburg Address). Such government can only occur with any lasting success under a written constitution that provides the basic rules under which that government can operate. Lincoln referred to the United States as "a new nation, conceived in liberty, and dedicated to the proposition that all [people] are created equal" (Lincoln's Gettysburg Address). The nation to which Lincoln referred operated under the rule of law, not of men, operating first under the Articles of Confederation, and functioning subsequently under the U.S. Constitution.

This chapter and appendices also uncovered other, similar answers to Aristotle's question that were provided by Chief Justice John Marshall in *Marbury v. Madison* (1803), by the U.S. Supreme Court in *Yick Wo v. Hopkins* (1886), by the United States First Circuit Court of Appeals in *United States v. Butler* (1936), by the U.S. District Court for the District of New Hampshire in *Chimento v. Stark* (1973) (a case affirmed without opinion by the U.S. Supreme Court), by both Judge Sirica's federal district court ruling and the federal circuit court's ruling in *In re Subpoena to Nixon* (1973), by the U.S. Supreme Court in *United States v. Nixon* (1974), and by Watergate Special Prosecutor Archibald Cox in the aftermath of the Saturday Night Massacre (October 21, 1973). America's response to Cox's use of Aristotle's question also uncovered the Roman

response to that same question, a response inscribed in American court house and law school architecture, “*Fiat justitia, ruat coelum*,” interpreted to read “Let Justice be done, though the Heavens fall.” (White, p. 5).

The discovery of the next thread proved to be somewhat troubling to this writer, primarily because of both current and future implications posed by this thread. Somewhat surprising to this writer was the prevalent use of propaganda techniques employed by Justice Rehnquist in the majority decision of *National League of Cities v. Usery*, by Justice O’Connor in dissenting opinions in *FERC v. Mississippi* and *Garcia v. San Antonio Metropolitan Transit Authority*, by Justice O’Connor in the majority opinion in *New York v. United States*, and by Justice Scalia’s majority opinion in *Printz v. United States*.

Initial impressions regarding the judicial use of propaganda techniques were subsequently confirmed by a studious investigation by this writer, which consisted of: 1) applying the techniques of propaganda analysis to the judicial opinions in question; and 2) examining the thoughts of other justices authoring opinions in the identified cases. The results of this study required the addition of an appendix entitled “Propaganda Techniques” (See Appendix M).

It is perhaps reliance upon propaganda techniques to achieve a pre-determined end rather than comprehensive legal analysis that lies at the root of “judicial activism.” At least one federal judge believes judicial activism is far more prevalent among conservative judges. Speaking at Drake University’s public forum on the judiciary and the media, Chief U.S. District Judge Mark Bennett declared, “There’s more judicial activism from the conservative judges than any liberal judges. There’s no question about that in my mind” (Dalmer, p. 1B). Which is somewhat ironic since “judicial activism” is “a term favored by right-wing groups to accuse liberal judges of making laws rather than applying them” (Dalmer, p. 1B). Judge Bennett offered examples of

propaganda techniques used by conservatives to “insinuate a political agenda,” e.g., their use of code words, which are a sophisticated use of the name-calling propaganda technique (Dalmer, p. 2B).

Regarding the use of the term “judicial activism,” it would appear that liberals and conservatives mean different things when each uses the term. The events surrounding the 2010 elections in Iowa shed some light on one meaning – judicial decisions which take into account majority social, religious, and economic values when making a decision. Decisions reached which contravene prevailing social values and mores are the result of activist judges, according to most conservative viewpoints. In 2010 an extensive campaign was mounted by Iowa conservatives to oust three state supreme court justices whose names appeared on the ballot to determine whether the voters wished to retain or to oust the justices. These justices were targeted by conservatives for their part in a unanimous 7-0 Iowa Supreme Court ruling, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), which, in effect, legalized same-gender marriages in Iowa through its holding that the Iowa law limiting the civil benefits of marriage to only a man and a woman violated the Iowa Constitution’s Bill of Rights. The justices had simply applied the Iowa Constitution to the facts of the case without regard to existing prejudices, much in the fashion exemplified by the portraits & statues of justice showing her with a blindfold, weighing the mix of facts and the law in the scales of justice in a dispassionate manner without favor or disfavor. For striking down a discriminatory state law that violated the Iowa Constitution, the Iowa Supreme Court Justices were accused of judicial activism. Enough voters disagreed with the Iowa Supreme Court’s decision strongly enough to align with the conservative advocacy directed at ousting the justices, and the three justices (which included the Chief Justice of the Iowa Supreme Court) were ousted by majority vote.

An examination of American history confirms this meaning of judicial activism, meaning a judicial decision reached by applying foundational law to the facts of the case that results in a decision that doesn't agree with prevailing beliefs and social mores. The term, activist judges, was applied by racists and conservatives to the Warren Court in the aftermath of its rulings regarding segregation in

courtrooms, jails and prisons, restaurants, hotels, bars, trains and train stations, buses, streetcars, elevators, lunch counters, swimming pools, beaches, baseball fields, fishing holes, telephone booths, prizefights, pool halls, factories, public toilets, hospitals, cemeteries, and virtually all other places where blacks and whites might meet. (Hall, 1992, p. 767)

The Warren Court simply applied the literal meaning of the Fourteenth Amendment to the facts of the various cases at hand without regard to racial prejudice. For this, the majority justices were accused of judicial activism.

The other meaning of judicial activism lies in the literal interpretation of the term – judges acting to achieve a pre-determined result through unsound judicial practices and through dubious argumentative practices instead of employing traditional judicial analysis in the objective sense of being blind to existing prejudices and social mores. In other words, engaging in judicial lawmaking. This is the meaning in which Chief U.S. District Judge Mark Bennett used the term.

Within the thread of judicial use of propaganda techniques by conservative justices, two distinctive strands were uncovered during the investigation of Tenth Amendment case law (See discussion in various parts of this chapter under the appropriate case headings). The first strand represented the consistent misuse of dicta from *Texas v. White* by various justices in majority opinions, which included the following: Justice Rehnquist's majority opinion in *National League of Cities v. Usery*, 426 U.S. 833, 844 (1976); Justice O'Connor's majority opinion in

*New York v. United States*, 505 U.S. 144, 162 (1992); and Justice Scalia’s majority opinion in *Printz v. United States*, 521 U.S. 898, 919 (1997). The misuse occurred because the dicta was lifted out of its original context and used for a purpose that was contradicted by both the reasoning and holding of *Texas v. White* (See 426 U.S. 833, 867-868, n. 8).

The second strand uncovered was the use of propaganda techniques to invent an interpretation of the Tenth Amendment not supported by either the text or the case law of the Amendment. The created interpretation centered on use of the Tenth Amendment as a restriction on a constitutionally delegated power. Examples of the interpretation as developed by different justices occurred in the following opinions: Justice Rehnquist’s “Tenth as a Declaration of Constitutional Policy” argument in the majority opinion in *National League of Cities v. Usery*, 426 U.S. 833, 841-845 (1976); Justice O’Connor’s reiteration of Rehnquist’s “Tenth as a Declaration of Constitutional Policy” argument in her dissenting opinion in *FERC v. Mississippi*, 456 U.S. 752, 778-779 (1982); Justice O’Connor’s “Spirit of the Tenth Amendment” argument in her dissenting opinion in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 582-585 (1985); Justice O’Connor’s “Federal Structure-Constitutional Framework” argument in the majority opinion in *New York v. United States*, 505 U.S. 144, 156-157 (1992); and Justice Scalia’s “Structure of the Constitution” argument in the majority opinion in *Printz v. United States*, 521 U.S. 898, 917-919 (1997).

Judicial criticism of these interpretations of the Tenth Amendment came from the following justices: Justice Brennan’s dissenting critique of Rehnquist’s reasoning in *National League of Cities v. Usery*, 426 U.S. 833, 858-872 (1976); Justice Blackmun’s majority opinion criticism of O’Connor’s lack of judicial reasoning in *FERC v. Mississippi*, 456 U.S. 742, 761-762, n. 25, 765, n. 29, 767-768, n. 30; Justice Stevens’ dissenting criticism of O’Connor’s

argument in *New York v. United States*, 505 U.S. 144, 211 (1992); and Justice Stevens' critique of Scalia's structural argument in *Printz v. United States*, 521 U.S. 898, 953-961 (1997). A criticism that hit the mark (regarding the opinions relying upon propaganda techniques to achieve a view of the Tenth Amendment as limiting the use of a delegated power) was that offered by Justice Blackmun, who commented on O'Connor's use of "rhetorical devices:"

While these rhetorical devices make for absorbing reading, they unfortunately are substituted for useful constitutional analysis. For while Justice O'Connor articulates a view of state sovereignty that is almost mystical, she entirely fails to address our central point.... [T]he partial dissent has pointed to no constitutionally significant theoretical distinction. (456 U.S. 752, 767-768, n. 30)

Initial questions regarding the Constitution also received an answer during the course of this chapter's investigation. In America true sovereignty resides in the people. Given both the final text of the preamble to the Constitution and the actions taken at the Constitutional Convention, the inescapable conclusion is that the people, not the states, are the "real sovereign source of the Constitution" (Rossiter, p. 229; see also Alexander Hamilton in *Federalist* No. 78; James Madison's actions and statements at the Constitutional Convention in Farrand, I, pp. 22, 122-123, 214; revised preamble to the Constitution by the Framers in Farrand, II, pp. 177, 553-554, 651; Corwin, 1965, p. 89; Wills, 1981/2001, pp. 131-134; Daniel Webster's arguments in *McCullough*, 17 U.S. 316, 326; William Pinkney's arguments in *McCullough*, 17 U.S. 316, 377-378; Chief Justice Marshall's opinion in *McCullough*, 17 U.S. 316, 402-405, 432; *In re Subpoena to Nixon*, 487 F.2d 700, 711). The idea that the people of the United States are the ultimate sovereigns flows from the Declaration of Independence as well, according to which:

That to secure these [inalienable] rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, - That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its

powers in such form, as to them shall seem most likely to effect their Safety and Happiness. (Declaration of Independence)

The Constitution is therefore not a compact entered into by the states. The Constitution also served as a general plan for American government instead of a detailed, cumbersome legal code (17 U.S. 316, 406-409, 413-418). And because of the nature of the Constitution as a general blueprint for government, the Constitution would require interpretation that took note of the scope of its general purpose whenever construing situations not specifically mentioned in its text (17 U.S. 316, 406-409, 413-416; *United States v. Darby Lumber Co.*, 312 U.S. 100, 118-119, 121; *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258). Finally, chief responsibility for interpreting the Constitution lay with the judiciary, particularly in terms of resolving constitutional questions (*Marbury v. Madison*, 5 U.S. 137, 177-180).

An additional thread, complimentary to the thread of disputed sovereignty, was that represented by the shifts in how the Tenth Amendment was interpreted by the various Courts over time. Debate focused on the content of the federal government's powers, with everything outside the content of those powers thus reserved to the states by the Tenth Amendment. A constitutional scholar described both the issue and the ensuing tasks:

The issue was: to what extent was the state police power, or state sovereignty, curbed by specific provisions of the federal Constitution limiting state action? The Court needed to develop a set of standards by which the Commerce Clause, the Contract Clause, the Supremacy Clause, and the guarantee of republican government in the states could be applied to determining the constitutionality of state legislation and common law rules. The Court's changing definitions of interstate commerce, of the obligation of contract, and of the reach of the Supremacy Clause all served to define the boundaries between state authority and national power. (Hall, 1992, p. 640)

One power not mentioned was the Spending Power of Congress, which will be addressed later in this summary. However, the overwhelming number of cases examined in this chapter focused on



the intersections of the Commerce Clause and the Tenth Amendment. Although the reach of the Commerce Clause changed, the debate always focused upon the content of “interstate commerce.” From its adoption in December 15, 1791 until June 24, 1976, the Tenth Amendment was never construed by any Supreme Court opinion as acting to limit the exercise of a constitutionally delegated power. Instead, the debate for 184 ½ years focused on the content of the delegated power. If a regulated activity fell outside the reach of the delegated federal power, it was an activity falling under those powers reserved to the states. Although a statute could be ruled unconstitutional as a violation of the Tenth Amendment, the violation occurred because the regulated power fell outside of the constitutionally delegated powers to the federal government.

That changed, however, with the Court’s 1976 decision in *National League of Cities v. Usery*. For the first time, in the absence of both textual support and prior case law, the Court ruled that the Tenth Amendment protected “States as States” and declared that a federal law enacted under the Commerce Clause represented an unconstitutional interference with essential “attributes of sovereignty attaching to every state government” (426 U.S. 833, 845). Although reduced by the subsequent Court ruling in *FERC v. Mississippi* (1982) and overturned by the Court’s ruling in *Garcia v. San Antonio Metropolitan Transit Authority* (1985), the view of the Tenth Amendment as limiting federal exercise of a constitutionally delegated power was reasserted by subsequent Court rulings in *New York v. United States* (1992) and *Printz v. United States* (1997). While that is the current interpretation of the Tenth Amendment, it is somewhat troublesome in that such a view was reached primarily through the use of propaganda techniques, which were substituted for judicial reasoning that took into account prior case law, the content of the asserted power in a judicial sense, and the text of the Amendment. Whether or not any of the dissents offered that challenged the currently prevailing view will serve as the

basis for a changed view remains to be seen. Any action would need to account for both the current interpretation and the dissenting interpretation.

Finally, the chapter concluded with a special example of the Spending Power of Congress, that of Conditional Spending. *South Dakota v. Dole* listed five requirements that had to be met in order to pass constitutional muster. To review, these requirements (and their case law citations) were:

- **General Welfare Requirement:** *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Helvering v. Davis*, 301 U.S. 619, 640-641 (1937); *United States v. Butler*, 297 U.S. 1, 65 (1936).
- **Unambiguous Conditions Requirement:** *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).
- **Relevant Relationship Requirement:** *South Dakota v. Dole*, 483 U.S. 203, 207-208 (1987); *Massachusetts v. United States*, 435 U.S. 444, 461 (1978); *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295 (1958).
- **Absence of a Constitutional Bar Requirement:** *South Dakota v. Dole*, 483 U.S. 203, 208 (1987); *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, 269-270 (1985); *Buckley v. Valeo*, 424 U.S. 1, 91 (1976); *King v. Smith*, 392 U.S. 309, 333, n. 34 (1968).
- **Absence of Financial Coercion Requirement:** *South Dakota v. Dole*, 483 U.S. 203, 211 (1987); *Steward Machine Co. v. Davis*, 301 U.S. 548, 589-590 (1937).

However, as the Court noted in *South Dakota v. Dole*, in reality there are only four requirements since, regarding the requirement that the spending must be for the national welfare, the Court's have generally deferred "to the judgment of Congress" (483 U.S. 203, 207 [summarizing

*Helvering v. Davis* dicta]). As the Court stated: “The level of deference to the congressional decision is such that the Court has more recently questioned whether ‘general welfare’ is a judicially enforceable restriction at all. See *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (*per curiam*)” (483 U.S. 203, 207, n. 2). As a result, action subsequent to *South Dakota v. Dole* need to take into account four requirements that must be met in order to constitutionally attach spending conditions to the receipt of federal funds in order to pass constitutional muster.

Penultimately, although the South Dakota Attorney General was not prepared to discuss the vital question regarding the relationship of the conditions to the purpose of the funding allocations, the Court’s willingness to discuss the Relevant Relationship Requirement should be both noted and heeded by future challengers of conditional funding legislation. The vital question here centers on the relationship of the conditions to the purpose of funding allocations. Federal aid to education is supportive. Specifically, Title I focuses on providing extra instruction to students who are behind their peers in reading and/or math. Although some limited funding has been made available to students of middle and high school age, the majority of funding has targeted students in the elementary grades. That is the purpose. The conditions go far beyond a remediation purpose, however. Conditions to be met in order to receive Title I funds now include meeting targets for middle and high school student proficiencies in reading, math, and science; requiring states to hold public schools accountable for meeting student achievement proficiency targets at the elementary, middle school, and high school levels; requiring every state to administer the National Assessment of Educational Progress to a sample of students; requiring the states to oversee a system of escalating sanctions to schools not deemed to be performing well by the federal government; and requiring states to abandon their own system of attendance requirements in favor of the federal law creating choice for students in schools not deemed to be

performing well by the federal government. These requirements have no relationship to the remedial needs of elementary students in reading and math.

The second conditional spending test to be examined centers on the Constitutional Bar Requirement. A constitutional bar might consist of a combination of arguments based on both the Guarantee Clause and the Tenth Amendment. The challenge to NCLB would not be made on the basis of either the Guarantee Clause or the Tenth Amendment. Either used by itself would be defeated, in this writer's opinion, by arguments based on previous successful defenses of conditional spending challenges. Instead the challenge is based on an argument that the combination of the two constitutional provisions acts to form a bar that must be passed in order for conditional spending to be constitutional. Arguably the threshold for challenges based on violations of a constitutional bar as part of a conditional spending test is lower than the threshold for a bar based solely on the Guarantee Clause or the Tenth Amendment that don't implicate the conditional spending arguments.

Also, the Court's discussion of the Guarantee Clause in *Baker v. Carr* merits consideration. According to the Court, "[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question" (369 U.S. 186, 209). A state's responsibility for the system of public education constitutes a political responsibility; therefore, it does not present a political question. In the same case, the Court noted analytical tests to be applied to detect the presence or absence of a political question (369 U.S. 186, 217; see also the summary portion of this paper's Guarantee Clause chapter). Application of those tests to the present argument presents no presence of a political question. Furthermore, in questions related to education, the Supreme Court has recognized that state efforts to provide a free and public system of education to the children of state residents should be "scrutinized under judicial

principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution" (411 U.S. 30, 39). Furthermore, a republican form of government surely includes the ability to legislate meaningfully about a topic. NCLB forecloses some of the most meaningful aspects of education from state and local control. In addition, the Supreme Court has recognized the necessity for states and local boards to exert primary responsibility over education because their judgments are more informed by knowledge of localized needs.

According to the Court:

[T]his case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. (411 U.S. 30, 42)

Lastly, a republican form of government surely includes meaningful involvement of citizens, particularly at the local and state levels. This, too, has been recognized by the Court when it declared:

The merit of local control was recognized last Term in both the majority and dissenting opinions in *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972). Mr. Justice Stewart stated there that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." *Id.*, at 469. The Chief Justice, in his dissent, agreed that "[l]ocal control is not only vital to continued public support of the schools, but it is of over-riding importance from an educational standpoint as well." *Id.*, at 478. (411 U.S. 30, 49)

Furthermore, two economic factors should be examined at the time a challenge to an existing conditional funding law is considered in order to determine whether valid argument can be made under the Financial Coercion Requirement. First, the economic condition of the state should be evaluated and calculations made to determine what percent of the total funds available would constitute the loss of federal funds. This should be compared with the following statement made by the Court in *South Dakota v. Dole*:

Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which “pressure turns into compulsion.” *Steward Machine Co. v. Davis*, [301 U.S. 548 (1937)], at 590. [Since South Dakota would lose only] 5% of the funds otherwise obtainable under specified highway grant programs [if it wished to maintain its minimum drinking age of 19] the argument as to coercion is shown to be more rhetoric than fact. (483 U.S. 203, 211)

At the state level, the loss of Title I funds used by the state department of education for operational costs should be calculated against the state allocation for operating the state’s department of education. When state funding is low, that percentage may implicate the Financial Coercion Requirement. For most schools in Iowa, except in high poverty areas, NCLB funds constitute less than 5% of a district’s general fund. Whether or not the following factors could be brought into play requires that a judgment be made: negative spending authority, budget deficits, state funding cuts, low or non-existent allowable growth, etc.

The second economic factor to be examined centers on just what federal funds would be impacted by a refusal to accept Title I funds under NCLB. If federal funding for other categories are withdrawn as well, e.g., school lunch funds, special education funds, other federal title program funds, then a situation would be created whereby the loss of federal funds conditioned by a school or state’s refusal to accept Title I funding would constitute financial coercion.

Finally, it’s unclear whether an individual school district can refuse to participate in NCLB or whether individual districts are bound by a decision at the state level. That situation may also vary from state to state in terms of particular state legislation and constitutional language.

The following chapter will feature an examination of the Fourteenth Amendment case law, focusing primarily upon the issue of education and whether it constitutes a fundamental right under the Equal Protection Clause. Due Process Clause implications will also be briefly

examined as well as other restrictions on state action by virtue of the Fourteenth Amendment's provisions.

## Chapter 7

### The Fourteenth Amendment

#### Introduction

For the purposes of this analysis, the relevant portion of the five sections comprising the Fourteenth Amendment of the U.S. Constitution resides in Section 1 and reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Farrand, IV, p. 98)

The second sentence of the Fourteenth Amendment's Section 1 contains both the "Due Process" and the "Equal Protection" clauses, two constitutional clauses that subsequently impacted most of the basic individual freedoms guaranteed by our nation's governing document, the U.S. Constitution. Beginning in the extreme latter part of the nineteenth century and continuing into the twentieth century, the U.S. Supreme Court used the Fourteenth Amendment as the basis by which various portions of the Bill of Rights came to be applied to the states, thereby serving as a limit on the actions of state and local governments against the fundamental rights of individuals.<sup>92</sup> Prior to this development (which came to be called the "Incorporation Doctrine"), the Bill of Rights served only to limit the actions of the federal government (Hall, 1992, p. 426). As a result, the Fourteenth Amendment came to have far-reaching effects in guaranteeing the multiple fundamental freedoms of American life.

The Fourteenth Amendment was one of three constitutional amendments<sup>93</sup> specifically designed to assist African-Americans realize the promise of America outlined in the Declaration of Independence, the world's first government document proclaiming the idea of universal



human rights (see Appendix R). The declaration of rights portion of our nation's foundational document began with the second sentence and declared:

We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. (Declaration of Independence)

The Fourteenth Amendment also overturned the Supreme Court's *Dred Scott* decision by removing race as a justification for the denial of either basic rights or the protection of the law in American society. Heifetz defined adaptive work as the difficult work required to change attitudes and beliefs, a process that took much longer than that required for technical work. For the larger part of American society the most difficult adaptive work involved changing the attitudes and beliefs of white Americans towards people on the socio-political margins of society – women and people of color (see Appendix R). Despite the clear language of the Fourteenth Amendment, it would take yet another constitutional amendment and another half-century of time (52 years) before women could vote (see Appendix R). Having extended the offer of statehood in the early days of the American Revolution to the Delaware Nation in return for their support, it would take another 146 years and a special act of Congress before tribal members received the right to vote, some 56 years following the adoption of the Fourteenth Amendment (see Appendix R). And finally, the adaptive work begun by abolitionists, furthered by Lincoln's Emancipation Proclamation, and continued by the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments took either 145 years (since the Emancipation Proclamation) or 138 years (since the adoption of the Fifteenth Amendment in 1870) before a person of African-American heritage could be elected to the nation's highest political office, that of President of the United States of America.

The Fourteenth Amendment arose out of the armed sectional conflict and the Union's attempts to reconstruct what were viewed as rebellious southern states. Arising as it did out of the Reconstruction, the Fourteenth Amendment's initial success and subsequent failures to address racial attitudes mirrored the successes and failures of Reconstruction. Evaluating the Reconstruction from an outsider's perspective, one British historian wrote:

Reconstruction, then, failed to save the South from herself, and the afro-American from the South. It did have a dramatic success in another direction. The Fourteenth and Fifteenth Amendments were to be dead letters in Dixie, but they put solid ground beneath the blacks in the North... Their existence, and their organization, meant that in parts of America the principle of human equality was still acknowledged, if not very willingly or, too often socially (*de facto* segregation in the North would for long be nearly as pervasive as *de jure* segregation in the South), then at least politically... (Brogan, pp. 381-382)

He concluded:

In that sense, then, Reconstruction was a victory. But it was a victory too long in coming; and, ... there are other reasons why, for Americans, a sour taste of failure and disappointment will always hang about the epoch. Not until the mid-twentieth century were many of their historians to find any good to say of it. (Brogan, p. 382)

## Historical Background

### **Intertwining of the guarantee clause and the fourteenth amendment.**

The Guarantee Clause of the Constitution played a prominent role in political discussions before, during, and after the Civil War. As a result, the Fourteenth Amendment intertwined with the Guarantee Clause since its inception. Emerging as part of the North's efforts to "reconstruct" the South, the Fourteenth Amendment was conceived as a means of ensuring basic rights for the newly freed slaves. The Civil War, Reconstruction, and the Fourteenth Amendment – all depended upon the Guarantee Clause for their constitutional legitimacy.

Federal officials and Congress cited the Guarantee Clause as justification for multiple actions taken during the course of the Civil War. For example, President Lincoln used the Guarantee Clause to justify the use of federal troops against southern rebels, an action subsequently approved by Congress (Wiecek, p. 171). Having called Congress into special session on the 85th anniversary of the Declaration of Independence, Lincoln laid out the ideological context of the Union's war effort for the assembled legislators:

The Constitution provides, and all the States have accepted the provision, that "The United States shall guarantee to every State in this Union a republican form of government." But, if a State may lawfully go out of the Union, having done so, it may also discard the republican form of government; so that to prevent its going out, is an indispensable *means*, to the *end*, of maintaining the guaranty mentioned; and when an end is lawful and obligatory, the indispensable means to it, are also lawful, and obligatory. (Emphasis in original) (Message to Congress, July 4, 1861, in Gienapp, p. 106)

While Lincoln did not formally cite the Guarantee Clause as justification for the imposition of a military governorship in Tennessee in March 1862 following the evacuation of rebel forces from Nashville, the man he appointed to act as military governor, Andrew Johnson, did. In the words of a historian of the period:

According to Johnson, in suppressing the rebellion the government was fulfilling its guarantee of a republican government to the state, which meant restoring the pre-existing state government. (Belz, p. 72)

Johnson proclaimed to his fellow Tennesseans:

I have been appointed, in the absence of the regular and established State authorities, as Military Governor for the time being, to preserve the public property of the State, to give the protection of law actively enforced to her citizens, and, as speedily as may be, to restore her government to the same condition as before the existing rebellion. (Belz, p. 72)

As the reader will soon see, this vision of reconstruction clashed with the Republican congressional vision of reconstructing the South, particularly the plan of reconstruction articulated four years later by the Joint Committee on Reconstruction.

In battling the presidential version of Reconstruction, Congress first used the Guarantee Clause to justify its attempts to exert congressional control over Reconstruction through the Wade-Davis Bill, which was pocket-vetoed by President Lincoln. As will be shown later, the Wade-Davis Bill marked a transition point for anti-slavery Republicans (Wiecek, pp. 186-186, 187; Stamp, pp. 39-40; Belz, pp. 201-203, 206-207, 212-213, 221, 224). Although Congress and two Presidents differed over Reconstruction, they were both united on the use of the Guarantee Clause to justify the idea of reconstructing the South. One historian articulated the reasoning behind President Lincoln's and the U.S. Congress's use of the Guarantee Clause:

[They] reasoned that the secession governments of the South were set up in violation of the Constitution, which [they] saw as depriving them of a republican form of government. Therefore [the Federal government] must use all means at its disposal, including the sword, to restore republican governments to the seceded states. (Wiecek, pp. 174-175)

Following the conclusion of armed hostilities, Congress used the Guarantee Clause to justify its activities "for reconstructing the South" (Wiecek, p. 199). On February 19, 1866, the House passed a resolution submitted by Representative John Broomall of Pennsylvania by a 104-33 vote that stated:

That whenever the people of any state are thus deprived of all civil government [by rebellion], it becomes the duty of Congress, by appropriate legislation, to enable them to organize a state government, and in the language of the Constitution, to guarantee to such a state a republican form of government. (*Globe*, 39 Cong., 1 sess., 916 ff. [19 Feb. 1866]; cited in Wiecek, p. 39)

Having been created in December of 1866, the Joint Committee on Reconstruction collected "volumes of testimony from witnesses residing in the South" and issued its report on April 28,

1866 (Stamp, p. 111).<sup>94</sup> The report “crushed the Democratic argument” which stated “that the guarantee clause [sic] required the federal government to maintain the existing ... state constitutions as they were in 1860” (Wiecek, p. 201). According to the report:

By withdrawing their representatives in Congress, by renouncing the privilege of representation, by organizing a separate government, and by levying war against the United States, they destroyed their state constitutions in respect to the vital principle which connected their respective states to the Union and secured their federal relations; and nothing of those constitutions was left of which the United States were bound to take notice. (Wiecek, p. 201)

Laying the groundwork for what would later become the Fourteenth Amendment, the report concluded that the rebellious states “ought not to participate in the government of the country until the civil rights of all their citizens were secured” (Stamp, p. 111). The report further concluded that the rebellious states

then lacked constituencies qualified to elect Senators and Representatives, that the majority of Southerners were still bitterly hostile to the government of the United States, and that the South therefore was not entitled to representation in Congress. (Stamp, p. 111)

One historian, who also possessed a law degree and had practiced law, described the report by the Joint Committee on Reconstruction and its implications in these terms:

[T]he report was the high-water mark of Republican development of the guarantee clause [sic] in the first session. The second session of the Thirty-ninth Congress would concern itself with implementing the theoretical consensus embodied in the report. (Wiecek, p. 203)

In the next congressional session Congress subsequently used the Guarantee Clause to reject the admission of Nebraska into the Union until the state amended its constitution by removing the “white-only” qualifications for voting (Wiecek, pp. 203-204; McKittrick, p. 453, n. 14 and p. 474). During the debate over the admission of Nebraska as a state, two arguments were developed centering on the Guarantee Clause:

As J.A.J. Creswell of Maryland explained, it was clear that the Tenth Amendment could not override the powers confided to Congress by the guarantee clause [sic]. His colleague James F. Wilson of Iowa began to develop the argument that the clause empowered Congress to supervise all amendments to all state constitutions, even after their admission, but the hammer fell in the middle of his speech, and the point was dropped. (Wiecek, p. 204)

President Johnson vetoed the congressional act rejecting Nebraska's admission into the Union until the state corrected its constitution, but Congress "promptly repassed" the Nebraska bill over Johnson's veto (Wiecek, p. 205).

President Johnson also cited the Guarantee Clause in each of his proclamations in the spring of 1865 that appointed provisional governors for the occupied southern states. Each proclamation also contained the following statement referencing the content of the Guarantee Clause:

Whereas it becomes necessary and proper to carry out and enforce the obligations of the United States to the people of \_\_\_\_\_ in securing them in the enjoyment of a republican form of government. (Wiecek, p. 189)

Also following the report by the Joint Committee on Reconstruction, Congress used the Guarantee Clause to develop what eventually became the Military Reconstruction Act that both asserted congressional control over Reconstruction by dividing "the ten ex-Confederate states (Tennessee being the exception) into five military districts" (Wiecek, p. 207). The Act empowered the brigadier general in charge of each district "to enforce the laws" and "to call for the election of delegates to constitutional conventions," elections which required the participation of black voters (Wiecek, p. 207). The Military Reconstruction Act also stipulated that the new state constitution "had to accord the ballot to Negroes" (Wiecek, p. 207) and required the newly elected legislature under the state's new constitution to "ratify the Fourteenth Amendment" (Wiecek, p. 207).

The multiple examples illustrating the intertwining of the Guarantee Clause and the Fourteenth Amendment were not lost upon future Supreme Court Justices articulating their decisions, nor were they lost upon the attorneys arguing cases before the Supreme Court. The Court addressed both the Guarantee Clause and the Fourteenth Amendment in the following cases:

- *Minor v. Happersett*, 88 U.S. 162 (1875).
- *United States v. Cruikshank*, 92 U.S. 542 (1876).
- *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
- *Plessy v. Ferguson*, 163 U.S. 537 (1896).
- *Taylor v. Beckham*, 178 U.S. 548 (1900).
- *Brown v. Board of Education*, 347 U.S. 483 (1953).
- *Baker v. Carr*, 369 U.S. 186 (1962).
- *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

As will be further illustrated, the intertwining of the Fourteenth Amendment and the Guarantee Clause grew out of the changing Union war aims, was influenced by several major undercurrents of American life, and eventually formed the centerpiece of Reconstruction.

### **Union war aims.**

#### ***Preservation of the union as a war aim.***

The Guarantee Clause was used by President Lincoln and Congress to justify the use of armed forces against southern secessionist forces. Over the course of the Civil War, Union war aims transformed from initial attempts to preserve the Union into what eventually emerged as the Reconstruction of the South. As had been the case with justifying the use of federal troops to quell a domestic rebellion, the Guarantee Clause provided the constitutional bedrock for

Reconstruction. In turn, Congress crafted the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution to fulfill the Union war aims and to form the cornerstones of Reconstruction. Understanding this transformational process in its historical context increases both understanding of and appreciation for the Fourteenth Amendment as part of the historical movement towards a more perfect realization of American ideals that were first set forth in the Declaration of Independence. A noted scholar of the period summarized the process in the following manner:

As the North progressed toward the framing of war objectives, America was inched along from right to left. It moved from hesitant support of a limited war with essentially negative aims toward a total war with positive and revolutionary aims. The character of the war changed from a pragmatic struggle for power to a crusade for ideals. The struggle took on many aspects of an ideological war, and in some minds became a holy war, fought, financed, and supported by men who could feel themselves instruments of divine will. (Woodward, 1960, 1968, p. 70)

When Lincoln was elected President and took the oath of office, the United States was officially a slaveholding republic. The Republican Party's published platform pledged Lincoln as President "to the protection of the institution of slavery where it existed" (Woodward, 1960, 1968, p. 70). In his first presidential address to the nation, Lincoln emphasized the need to prevent secession and the resulting disruption of the Union, which was essentially a negative aim, that of preventing something from happening. Lincoln first addressed the fears motivating secession.

Apprehension seems to exist among the people of the Southern States, that by the accession of a Republican Administration, their property, and their peace, and personal security, are to be endangered. There has never been any reasonable cause for such apprehension. (First Inaugural Address, March 4, 1861, in Gienapp, p. 88)

Observing that his previous speeches provided "ample evidence to the contrary," Lincoln cited his own "published speeches" and quoted from an unidentified speech:



I do but quote from one of those speeches when I declare that “I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.” (First Inaugural Address, March 4, 1861, in Gienapp, p. 88)

Having rendered southern fears groundless, Lincoln proceeded to discuss the idea of the union of individual states into a unified country and what that union signified.

I hold, that in contemplation of universal law, and of the Constitution, the Union of these states is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper, ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our national Constitution, and the Union will endure forever... (First Inaugural Address, March 4, 1861, in Gienapp, pp. 90-91)

Having established the idea of a permanent Union, Lincoln directly confronted the actions taken by various southern state legislatures regarding secession.

It follows from these views that no State, upon its own mere motion, can lawfully get out of the Union, - that *resolves* and *ordinances* to that effect are legally void; and that acts of violence, within any State or States, against the authority of the United States, are insurrectionary or revolutionary, according to circumstances. (Emphasis in original) (First Inaugural Address, March 4, 1861, in Gienapp, p. 91)

Lincoln spelled out the federal government’s course of action, an action that was not only consonant with, but also required by, the Constitution.

I therefore consider that, in view of the Constitution and the laws, the Union is unbroken’ and, to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States.... I trust this will not be regarded as a menace, but only as the declared purpose of the Union that it *will* constitutionally defend, and maintain itself. (Emphasis in original) (First Inaugural Address, March 4, 1861, in Gienapp, pp. 91-92)

Some four months later, Congress followed Lincoln’s lead in terms of spelling out the purpose for waging an armed conflict. On July 22, 1861, the House of Representatives enacted a resolution containing the following declaration:

[T]his war is not waged ... [for the] purpose of overthrowing or interfering with the ... established institutions of those States, but to ... maintain ... the ... States unimpaired; and that as soon as these objects are accomplished the war ought to cease. (Woodward, 1960, 1968, p. 71)

The Senate concurred in these war aims by passing a “similar resolution, also adopted by a nearly unanimous vote” (Woodward, 1960, 1968, p. 71). Thus initially the Union was fighting a war against secession, a war whose purpose was to preserve the Union.

***Freedom for slaves as a war aim.***

Unlike the first war aim, the second purpose for fighting was neither deliberately nor carefully crafted by either President Lincoln or Congress. Instead freedom for slaves emerged as the war progressed. As Lincoln himself admitted, the second war aim was forced by events and necessities. The second war aim “first took the shape of thousands of pitiable fugitive slaves crowding into the Union lines” (Woodward, 1960, 1968, p. 71). The emergence of the Union’s second purpose for waging war against the South was described by a leading historian of the period:

Freedom as a war aim was arrived at by a long succession of piecemeal decisions. There were orders by field commanders, some countermanded, some sustained; there were acts of state legislatures; and there was a long succession of bits and dribbles of emancipation enacted by Congress, which did not get around to repealing the Fugitive Slave Act until June of 1864. (Woodward, 1960, 1968, pp. 71-72)

While most of us think of Lincoln’s Emancipation Proclamation as a single act, it actually consisted of two separate proclamations. Adding to the complexity of the emergence of freedom as a war aim, Lincoln’s private and public statements differed. Privately, meeting with his cabinet in a “special session” in September, 1862, Lincoln confided to his cabinet members that the time to issue an Emancipation Proclamation had come, that “it was a promise made only

to ‘myself and ... to my Maker’” (Guelzo, p. 341). Gideon Welles, Lincoln’s Secretary of the Navy, described Lincoln’s comments as

a vow, a covenant, that if God gave us the victory in the approaching battle [at Antietam], he would consider it an indication of the divine will and that it was his duty to move forward in the cause of emancipation. (Guelzo, p. 341)

In the immediate aftermath of Antietam, in a meeting with his cabinet, Lincoln described the battle’s outcome in terms of its relationship to the question of emancipation, stating, “God has decided this question in favor of the slaves” (Guelzo, p. 342). On September 22, 1862, immediately following the withdrawal of Confederate forces from Antietam Creek in Maryland back to Virginia, Lincoln “issued the Preliminary Emancipation Proclamation,” signing the document in front of his cabinet at a special cabinet meeting (Brogan, p. 340-341).<sup>95</sup>

As one historian described Lincoln’s thoughts:

Foremost was the consideration that slavery had caused the great rebellion. It had also poisoned political life for more than thirty years. The only way of making sure that it would never wreak such mischief again was to destroy it. Lincoln no longer had any doubt that it was a legitimate aim of the war to remove the cause of the war. (Brogan, p. 337)

After the House of Representatives “passed a resolution in support of the Proclamation” when Congress convened in December, 1862, Lincoln signed the final draft of the Emancipation Proclamation on New Year’s Day, January 1, 1863 (Brogan, p. 341).

Lincoln’s public statements exhibited a different tenor from his private remarks just cited. Perhaps this difference between private and public remarks reflected his awareness of then-current political realities regarding the views held by many white Americans at the time.

The “justice and sound judgment” of white supremacy, Lincoln said in his 1854 Peoria speech, “is not the sole question, if indeed, it is any part of it.” Instead Lincoln held that the “universal feeling” among whites that blacks were inferior, “whether well or ill-founded, can not be safely disregarded.” (Oakes, p. 38)

Perhaps the difference between private and public statements reflected Lincoln's own previous publicly-stated views expressed on a single occasion during the Lincoln-Douglas Debates of 1858, remarks that were characterized by one historian as "the worst words he ever uttered" (Oakes, p. 39). At the fourth debate, Lincoln introduced his remarks by describing an encounter he had earlier that same day. Lincoln began, "While I was at the hotel to-day [sic] an elderly gentleman called upon me to know whether I was really in favor of producing a perfect equality between the negroes and white people" (Fourth debate, at Charleston, September 18, 1858, in Gienapp, p. 57). Lincoln responded to the query by declaring:

I will say then that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races, - that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people... (Fourth debate, at Charleston, September 18, 1858, in Gienapp, p. 57)

Lincoln continued, "[T]here is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality" (Fourth debate, at Charleston, September 18, 1858, in Gienapp, p. 57). Or, perhaps the difference between public and private comments stemmed from a conscious decision to test public opinion for reactions to a changing policy à la Heifetz' concept of adaptive work.

Describing Lincoln's public comments on the Proclamation, one historian stated:

When Lincoln finally resorted to the Proclamation, he presented it as a war measure, authorized by war powers and justified by military necessity. Again and again he repeated that it was a means to an end – the limited Lincolnian end of union – and not an end in itself, that union and not freedom was the true war aim. (Woodward, 1960, 1968, p. 73)

Previously Lincoln had offered a plan for gradual emancipation and colonization of freed slaves, which was described by a historian of the period as follows:

This was an extremely conservative plan for gradual and voluntary emancipation over a period of thirty-seven years, to be completed by 1900, to be administered by the slave states themselves, and to be assisted by the Federal government with compensation to slaveowners and foreign colonization of freedmen. (Woodward, 1960, 1968, p. 72)

As C. Vann Woodward dryly noted, “Support was not forthcoming, and war developments underlined the impracticality of the plan” (Woodward, 1960, 1968, pp. 72-73). One of Lincoln’s biographers pointed to the opposition of free blacks to colonization: “Free blacks in the North had opposed colonization for decades; they had no intention of leaving the only country they had known...” (Guelzo, p. 346). Professor Guelzo further noted, “Rather than colonization, what Douglass and the Radical Republicans wanted Lincoln to do was to begin recruiting freed blacks into the federal armies and turning them back against their former masters” (Guelzo, p. 347). Lincoln further thought that both congressional action and a constitutional amendment would be required for emancipation to be legally applied throughout the entire nation. Describing the confluence of dimming prospects for his original plan and impending emancipation, one historian presented the following analysis:

He [Lincoln] characterized it [the Emancipation Proclamation] as a war necessity, forced by events, ineffectual, inadequate, and of doubtful legality. It is plain that his heart was in his plan for gradual emancipation, which he repeatedly but unsuccessfully urged upon Congress and proposed as a Constitutional amendment. (Woodward, 1960, 1968, p. 72)

While privately expressing his feelings about emancipation in spiritual terms, as a former attorney and legislator, Lincoln knew that religious feelings offered no legal justification for a nation’s public policy. A professor specializing in American politics analyzed the legal questions posed by emancipation:

Under the Constitution the President had no right to meddle with private property in such a sweeping fashion except perhaps on the plea of the most extreme military necessity. More than that, an assault – any assault – on

property – any property – was fundamentally antipathetic to the American tradition, which regarded property as sacred. (Brogan, p. 340)

It was this notion of slaves as property that Lincoln had attacked in the Lincoln-Douglas Debates of 1858, a notion that had been given constitutional approval by the Supreme Court in the *Dred Scott* decision. Lincoln had begun attacking the Court's decision after it had been published in 1857, honing in on the Chief Justice Taney's claim "that blacks were not citizens because their ancestors had been slaves at the time of the Revolution (Oakes, p. 39). Professor Oakes described and summarized Lincoln's criticism of the *Dred Scott* decision:

What about the millions of immigrants who were quickly becoming citizens, Lincoln asked. Their ancestors weren't even here when the nation was founded. Taney's bad logic and egregious history led Lincoln to suspect something sinister. By stripping northern blacks of their citizenship, Lincoln believed, Taney was laying the groundwork for the nationalization of slavery. *Dred Scott* already allowed slavery into the territories; one more decision and it would be allowed into the northern states as well. (Oakes, p. 39)

Lincoln also characterized the Taney Court's decision as an assault on and a denigration of the nation's Declaration of Independence. Responding to Douglas's defense of the *Dred Scott* decision, Lincoln observed:

In those days [before the *Dred Scott* decision], our Declaration of Independence was held sacred by all, and thought to include all; but now, to aid in making the bondage of the negro universal and eternal, it is assailed, and sneered at, and construed, and hawked at, and torn, till, if its framers could rise from their graves, they could not at all recognize it. All the powers of earth seem rapidly combining against him. Mammon is after him; ambition follows, and philosophy follows, and the Theology of the day is fast joining the cry. (Speech in Springfield, June 26, 1857, in Gienapp, p. 40)

To further buttress his argument that the Declaration of Independence included all and that the Founders looked to an end of slavery, during the 1860 presidential campaign Lincoln cited both

the Northwest Ordinance passed by Congress in 1787 and the remarks made by President Washington to Lafayette:

[Washington had] as President of the United States, approved and signed an act of Congress, enforcing the prohibition of slavery in the Northwestern Territory, which act embodied the policy of the Government upon that subject ...; and about one year after he penned it, he wrote La Fayette [sic] that he considered that prohibition a wise measure, expressing in the same connection his hope that we should at some time have a confederacy of free states. (Speech at the Cooper Union, February 27, 1860, in Gienapp, pp. 72-73)

Senator Stephen Douglas pounced on Lincoln's opposition to the *Dred Scott* decision in the first of his debates with Lincoln in Ottawa, articulating the majority opinion of the time:

We are told by Lincoln that he is utterly opposed to the Dred Scott decision and will not submit to it for the reason that he says it deprives the negro of the rights and privileges of citizenship.... I ask you, are you in favor of conferring upon the negro the rights and privileges of citizenship? ...I am opposed to negro citizenship in any and every form.... I am in favor of confining citizenship to white men, men of European birth and descent, instead of conferring it upon negroes, Indians, and other inferior races. (Oakes, p. 39)

In the fifth debate with Douglas in Galesburg, Lincoln "declared that 'the right of property in a slave is *not* distinctly and expressly affirmed in the Constitution'" (Oakes, p. 40). In the final debate in Alton, Lincoln again denied that such a right existed by declaring, "I do not believe it is a constitutional right to hold slaves in a territory of the United States" (Oakes, p. 40).

Articulating his argument against the notion of slaves as property, Lincoln argued that Senator Douglas's advocacy of popular sovereignty as the determinant of whether or not slavery should exist in the territories "was wrong because it assumed that slaves were no different from hogs or cotton" (Oakes, p. 40). In Lincoln's view, according to one historian's summary,

There were limits – moral limits – beyond which the market should never be allowed to go, and surely one of them was the buying and selling of human beings. It that's not wrong, Lincoln said, nothing is wrong. (Oakes, p. 40)

Near the end of this final debate between Lincoln and Douglas in Alton, Lincoln stated that the “real issue” between the two men transcended the argument of whether slavery was right or wrong. According to Lincoln, the real issue was the

struggle between these two principles, right and wrong, throughout the world.... The one is the common right of humanity, and the other the divine right of kings. It is the same principle in whatever shape it develops itself. It is the same old serpent that says, “You work and toil and earn bread, and I’ll eat it.” Not matter in what shape it comes, whether from the mouth of a king who seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of men as an apology for enslaving another race, it is the same tyrannical principle. (Oakes, p. 40)

Lincoln had previously argued that slavery was wrong because it denied the nation’s promise of equality embedded in the Declaration of Independence. Douglas’s reply was to insist that the Founding Fathers “had never intended to include an inferior race of blacks in the Declaration’s promises” (Oakes, p. 40). With his concluding argument in the final debate at Alton, Lincoln “went beyond the legacy of the Revolution [by fusing] the inalienable ‘rights of man’ [with] the universal rights of labor” (Oakes, p. 40). According to Professor Oakes, “The result was an astonishingly eloquent denunciation of slavery in which social, economic, political, and moral arguments were seamlessly interwoven” (Oakes, p. 40).

In his subsequent campaign for the presidency, Lincoln sharpened his attack on the property right argument used to justify slavery. Speaking at the Cooper Union in New York, Lincoln criticized the Court’s *Dred Scott* constitutional analysis, stating “that the Court erred in its *Dred Scott* decision, not by illicit opining on the facts, but from an initial misapprehension of what the facts were” (Wills, 2008, p. 4). Lincoln pointed out that, according to the Court, “[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution” (quoted in Wills, 2008, p. 40). According to Lincoln, this was false – slaves were never called property in the Constitution:



[N]either the word “slave” nor “slavery” is to be found in the Constitution, nor the word “property” even, in any connection with ... slave, or slavery, and that wherever in that instrument the slave is alluded to, he is called a “person;” – and wherever his master’s legal right in relation to him is alluded to, it is spoken of as “service or labor which may be due,”...  
(Speech at the Cooper Union, February 20, 1860, in Gienapp, pp. 77-78)

According to the explicit language of the Constitution, Lincoln pointed out, slaves “are referred to only as ‘persons’ who perform a ‘service or labor’” (Wills, 2008, p. 4). As Professor Wills both summarized and highlighted the import of Lincoln’s analysis of the Court’s opinion, “This is hardly a distinct and express statement of property in them” (Wills, 2008, p. 4). As Lincoln had illustrated, the property clause of the Constitution had made no mention of slaves. Both the “three-fifths” clause adding that fraction of the slave population for apportioning representatives to Congress and the fugitive slave clause referred to slaves as “persons,” not as property. As one professor of American history paraphrased Lincoln’s analysis:

The founders had restricted slavery wherever they could and recognized it out of necessity where they had to, Lincoln concluded, but they did not raise slavery to the level of a constitutionally protected property right. (Oakes, p. 40)

Upon entering office as President, Lincoln affirmed that he would enforce the fugitive slave clause of the Constitution as required by his oath to give “support to the whole Constitution;” however, he also declared that free blacks who were hunted down as fugitives were “entitled to all privileges and immunities of citizens” as also provided in the Constitution (First Inaugural Address, March 4, 1861, in Gienapp, p. 90).

The penultimate legal measure to the final Emancipation Proclamation was a legal opinion by Attorney General Edward Bates issued on November 29, 1862, which followed Lincoln’s earlier legal arguments against the legitimacy of the *Dred Scott* decision. Paraphrasing Attorney General Bates’ opinion, Professor Oakes wrote, “Not one word of the Constitution ...

justifies the color barrier to citizenship that Taney had proclaimed in *Dred Scott*. Free blacks who were born in America were citizens of the United States” (Oakes, p. 39). Describing the historical import of this opinion, Professor Oakes observed:

During Lincoln’s presidency the *Dred Scott* citizenship ruling was pronounced null and void and within a few years Bates’s reasoning would be permanently affixed in the Constitution by the Fourteenth Amendment. (Oakes, pp. 39-40)

So, through a series of stumbling steps taken either in reaction to or in concert with unforeseen, but emerging forces and events, freedom became the second war aim for the Union.

Describing the elevation of “the war to a new plane,” Professor Vann Woodward wrote:

It was no longer merely a war against something, but a war for something, a war for something greatly cherished in American tradition and creed, a war for freedom. What had started as a war for political ends had, by virtue of military necessity, undergone a metamorphosis into a higher and finer thing, a war for moral ends. What had commenced as a police action had been converted into a crusade. (Woodward, 1960, 1968, p. 73)

***Equality as a war aim.***

***Republican congressional support.***

The second war aim, freedom for slaves, represented somewhat of a paradox as “[t]he great majority of citizens in the North still abhorred any association with abolitionists” (Woodward, 1960, 1968, p. 73). Freedom as a war aim somewhat concealed, but did not eliminate, a deep and strong undercurrent channeling through the bedrock of white America’s conscious and subconscious beliefs, a racial belief in white superiority. However, what the abolitionists stood for represented yet another bedrock belief of American political society, a belief that hadn’t yet percolated into the personal belief systems of most Americans at the time, a belief that ran counter to notions of white racial supremacy. A long-time student of American history described the conceptual roots of equality:

It would be preposterous to credit the abolitionists with surreptitiously introducing the idea of equality into America. The nation was born with the word on its tongue. The first of those “self-evident” truths of the Declaration was that “all men are created equal.” Back of that was the heritage of natural rights doctrine, and back of that the great body of Christian dogma and the teaching that all men are equal in the sight of God. (Woodward, 1960, 1968, pp. 75-76)

The commitment to equality as a war aim was not as firmly made as was the commitment to freedom, which had the support of both the executive and legislative branches of government. Only the Republicans in Congress supported equality as a war aim. Vann Woodward described the contrasting support of the two war aims:

There was no Equality Proclamation to match the Emancipation Proclamation. The third war aim never gained from Lincoln even the qualified support he gave to abolition. Without presidential blessing the commitment was eventually made, made piecemeal like that to freedom, and with full implications not spelled out until after the war – but it was made. (Woodward, 1960, 1968, p. 75)

Of the three branches of government, then, equality as a war aim enjoyed only the support of the Republican-dominated Congress. Neither President Lincoln nor President Johnson, a Tennessee Democrat, supported it. Nor, short of a constitutional amendment, would the Supreme Court uphold the legality of mere laws legislating equality, laws whose constitutionality most certainly would have been challenged in the judicial branch of government (See Brogan, pp. 340-341; Guelzo, p. 344; James, 1965, p. 106; & Stamp, p. 136). Chief Justice Taney, author of the *Dred Scott* decision, served on the Court until late 1864. And later, it would be a conservative Supreme Court that would re-define “equality” as it narrowed the scope of the Fourteenth Amendment’s application to legal questions of equality.

*Thirteenth amendment.*

The idea of equality played a major role in congressional debates surrounding the Thirteenth Amendment, the constitutional amendment that abolished slavery. Ostensibly focused on freedom, abolitionists had long associated freedom with equality.

Antislavery congressmen carried this association of aims into the framing of the Thirteenth Amendment. Debates over the question in the Senate in the spring of 1864 and in the House of Representatives in January, 1865, contain evidence that the framers [of the Thirteenth Amendment] aimed at equality as well as emancipation. (Woodward, 1960, 1968, p. 76)

Both objectives, freedom and equality, were assumed to be involved in the Thirteenth Amendment by both supporters and opponents of the proposed amendment. One supporter, William D. Kelley of Pennsylvania, declared, “The proposed Amendment is designed ... to accomplish ... the abolition of slavery in the United States, and the political and social elevation of Negroes to all the rights of white men” (Woodward, 1960, 1968, p. 77). Precursory to the Fourteenth Amendment, supporters of the Thirteenth Amendment “specifically and repeatedly mentioned equal protection of the laws ... and guarantee against deprivation of life, liberty, and property without due process of the law” (Woodward, 1960, 1968, p. 77).

Given the prevailing notions of white supremacy held by the majority of Americans at the time, the idea of equality provided the “main ground of opposition to the amendment” (Woodward, 1960, 1968, p. 77). Opponents of the Thirteenth Amendment complained “that the amendment would not only free the Negroes but would ‘make them our equals before the law’” (Woodward, 1960, 1968, p. 77). As can be seen by examining the following text of the Thirteenth Amendment (see Figure 4 below), the broader construction that would have included equality with freedom did not survive the political realities at that time.

The political reality confronting the Thirty-eighth Congress that legislated the version of the Thirteenth Amendment subsequently sent to the various state legislatures – that political

reality consisted of the make-up of Congress and the requirements of Article V of the United States Constitution which stipulated:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution ... which, ... shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States ... (Article V, Constitution of the United States)

*Figure 4:  
Thirteenth Amendment of the Constitution*

Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

While Republicans controlled both chambers of the Thirty-eighth Congress, their House membership did not constitute the required two-thirds majority required by Article V. The House membership of the Thirty-eighth Congress comprised “eighty-six Republicans, seventy-two Democrats, and twenty-four border state Unionists,” which gave Republicans only 47% of the total House membership (Keller, p. 195).<sup>96</sup> The Senate membership consisted of “thirty Republicans, twelve Democrats, and seven border state Unionists,” which gave Republicans a 61% majority in the Senate (Keller, p. 195).<sup>97</sup> On February 8, 1864, Senator Charles Sumner from Massachusetts introduced a joint resolution in the Senate for the abolition of slavery, “which included the clause ‘all persons are born equal under the law’” (Keller, p. 196). Describing the Senate interplay between the ideals of America’s promise articulated in the Declaration of Independence, the political reality of the historical period, and the requirements of

Article V of the U.S. Constitution, a professor of political science and American history observed:

Concerned that such wording on equality might derail the chances for passage, Lyman Trumbull of Illinois – also a firm protagonist of black rights – offered his own phraseology, omitting Sumner’s controversial language but adding Congress’s power to enforce the abolition of slavery. Trumbull’s wording was accepted. Sumner at first held out for his own version, although he finally acquiesced. (Keller, p. 196)

*Civil rights act of 1866.*

The Thirty-ninth Congress faced a different set of political realities from their predecessors. Republicans were in control of both houses. Continuing the struggle for equality, the Republican Congress next embodied its version of equality in the civil Rights Act of 1866. Partly in response to the notorious Black Codes<sup>98</sup> enacted by the Johnson restoration governments in the South, and partly in response to the “inducement of political gains as well, “ the 1866 Civil Rights Act gave sweeping protection to the rights of African-Americans as citizens, guaranteeing them “full and equal benefit of all laws and proceedings for security of person and property, as is enjoyed by white citizens,” regardless of any law to the contrary” (Woodward, 1960, 1968, p. 77). Furthermore, the Civil Rights Act removed race as a criterion for citizenship (except for American Indians) when

it declared that “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed,” are citizens of the United States. This act removed the doubts about the Negroes’ status which had been raised before the war when the Supreme Court, in the Dred Scott case, held that Negroes were not citizens.... (Stampp, pp. 135-136)

When President Johnson vetoed the Civil Rights Act of 1866, Congress “re-passed” the Act over the President’s veto “by the necessary two-thirds majority in each house” (Brogan, p. 364). At the same time, Congress was in the midst of considering what came to be known as the Fourteenth Amendment. However, in order to more fully comprehend the full enormity of the

constitutional task, both the context of the times and the hurdles overcome by the congressional passage and the states' approval of the Fourteenth Amendment need to be examined.

**Major undercurrents impacting reconstruction.**

If one focuses on the issue of slavery in American life, then both the Civil War (and its sub-themes of Union war aims and emancipation) and Reconstruction (which gave birth to the Fourteenth Amendment) can be viewed as the playing out of the opposing forces captured by Lincoln in his image of America as a “House Divided.” Speaking to the Illinois Republican state convention in 1858 to accept their nomination as the party’s candidate to oppose Stephen A. Douglas in his reelection bid for the U.S. Senate, Lincoln focused on slavery as a critical issue facing America. Characterizing the efforts to either maintain or to abolish slavery as “agitation,” Lincoln declared:

In *my* opinion, it [agitation] *will* not cease, until a *crisis* shall have been reached and passed.

“A house divided against itself cannot stand.”

I believe this government cannot endure, permanently half *slave* and half *free*.

I do not expect the Union to be *dissolved* – I do not expect the house to *fall* – but I *do* expect it will cease to be divided.

It will become *all* one thing, or *all* the other.

Either the *opponents* of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in course of ultimate extinction; or its *advocates* will push it forward, till it shall become alike lawful in *all* the States, *old* as well as *new* – *North* as well as *South*. (Emphasis in original) (Speech to the Republican state convention, June 16, 1858, in Gienapp, pp. 43-44)

As the nation struggled to eliminate slavery, a variety of forces exerted influence. Whether sociopolitical or socioeconomic or sociohistorical in nature, these forces exerted a fundamental and enduring impact upon people and events. To more fully understand the emergence of the Fourteenth Amendment requires a contextual understanding of American society at that time. And, a contextual understanding of mid-nineteenth century American

culture requires an understanding of the fundamental perceptions and forces operating at the time. To facilitate understanding, these fundamental beliefs, perceptions and forces have been grouped into three categories: political, psychological, and sociological. Their separation is not meant to suggest that any single factor acted in secluded fashion to the exclusion of others. It is hoped, however, that a separate focus on each will promote an understanding of the complex forces at work as well as provide a contextual background that illuminates the events surrounding the Fourteenth Amendment.

***Political undercurrents.***

Although much more attention will be given to the fundamental beliefs, perceptions, and forces of the identified psychological and sociological undercurrents, it should be understood that all these undercurrents were played out in the political arena. The political arena featured battles between Republicans and Democrats for control of Congress, between a Congress with a Republican majority and a Republican President for control of Reconstruction, and between a Republican-dominated Congress and a Democratic President over what the post-war program for the South would be.

***Republican-democrat battle for control of congress.***

Regarding the battle between the two parties for control of Congress, we have already discussed the impact of that battle upon the compromise of the wording of the Thirteenth Amendment (the Thirty-eighth Congress which had a Republican majority but not control in the House and Republican control in the Senate) and the Civil Rights Bill of 1866 (the Thirty-ninth Congress which featured Republican control of both the House and Senate). Voters gave Republicans control of both legislative chambers as a result of the severity of the military struggle as well as the changing Union war aims that provided almost prophetic status to



Republican abolitionists with the emergence of freedom as a purpose for fighting the war. The results of the inter-party battle for control of Congress would significantly impact both the nature of Reconstruction and the emergence of the Fourteenth Amendment (See subsequent section, “The Battle Between a Republican Congress and a Democratic President Over Reconstruction,” commencing at p. 762). Control of Congress would also play a major role in decisions about giving the vote to African-Americans, a topic that will be discussed more fully later in this chapter when sociological undercurrents are discussed.

*The battle between a republican congress and a republican president over reconstruction.*

The Wade-Davis Bill of 1864 pitted a Republican Congress against a Republican President in a contest to determine which branch of government would exert primary control over reconstructing the South. Lost in the shuffle because of their minority status of being outnumbered by Republicans were the Democrats and Unionists. As mentioned previously, each side (Republican Congress & Republican President) cited the Guarantee Clause in the argument over control of Reconstruction. In December 1863 President Lincoln had presented his plan of reconstruction by issuing a “Proclamation of Amnesty and Reconstruction” requiring “a minimum of ten per cent of the qualified voters of 1860 to take an oath of allegiance” to the Union (Wiecek, p. 184; Stamp, p. 39). According to Lincoln’s proclamation, such a minority could subsequently reorganize a state government that would be recognized by the President. Lincoln’s plan for reconstruction “offered the prospect ... of inaugurating state governments while the war still continued” (Belz, p. 210). At the time the Wade-Davis Bill was being discussed, Lincoln’s plan of reconstruction was already underway in Louisiana and Arkansas.

The Republican Congress had other ideas about reconstructing the southern states before they were once again a legal part of the Union. In July 1864 Congress enacted into legislation a

bill sponsored by Senator Benjamin Wade of Ohio and Representative Henry Davis of Maryland, which was entitled “a bill to guaranty certain states a republican form of government” (Wiecek, p. 185). In first introducing the bill in the House, Davis further referenced the Guarantee Clause and claimed that only Congress could enforce its provisions. According to Representative Davis:

That clause vests in the Congress of the United States a plenary, supreme, unlimited political jurisdiction, paramount over courts, subject only to the judgment of the people of the United States, embracing within its scope every legislative measure necessary and proper to make it effectual; and what is necessary and proper the Constitution refers in the first place to our judgment, subject to no revision but that of the people. (Wiecek, p. 185)

In support of the claim for congressional power regarding the Guarantee Clause, which in turn asserted congressional control over reconstructing the rebellious states and their illegal governments, Representative Davis cited the Supreme Court ruling in *Luther v. Borden*, in which Chief Justice Taney wrote:

Under this article of the Constitution [the Guarantee Clause as articulated in Article I, § 4] it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in a State before it can determine whether it is republican or not. (48 U.S. 1, 42 (1849); cited in Belz, pp. 206-207; see previous pp. 119-124 of this document for discussion of *Luther v. Borden*)

The congressional plan for reconstructing the South differed from Lincoln’s plan in several respects. First, the Wade-Davis Bill required “50 per cent of the white male citizens to take an ‘ironclad’ loyalty oath before a state might recover its powers” (Brogan, p. 185). The enrollment of eligible white male citizens was to be supervised by a military governor who would rule the Confederate state until a state convention was held to “repudiate secession and abolish slavery” (Stampp, p. 39). The 50% requirement effectively changed the timing of when reconstruction would occur. Lincoln’s 10% requirement meant that reconstruction could proceed before the South was completely defeated militarily. Congress’s 50% requirement meant that

reconstruction would take place only after the war was completed (Belz, pp. 210, 241). The two plans for reconstructing the South also differed in their approach to the issue of slavery. The Wade-Davis Bill, by requiring a repudiation of former secession legislation as well as state action to abolish slavery as a condition of re-admission to the Union, abolished slavery in the rebellious states, but not other states. Lincoln's plan for reconstruction did not directly address the issue of slavery, an issue that he thought required a constitutional amendment. Also, while Lincoln's previous Emancipation Proclamation freed the slaves in the rebellious states who came under Union military control, it did not directly abolish slavery. In fact, according to one historian, "Lincoln's turning toward military emancipation also raised a question with radical implications: whether the abolition of slavery would be a condition for the return of the rebel states to the Union" (Belz, p. 101).

Both the presidential and congressional plans for reconstructing the rebellious states to ensure southern governments who were loyal to the Union did agree with regard to the procedure of appointing a federal military officer "to carry on the civil administration of a state and enforce existing state laws, except those relating to slavery, until a loyal government was formed and recognized" (Belz, p. 238). Both plans also agreed on "emancipation as a minimum condition of reconstruction" (Belz, p. 239). Both plans agreed in another area as well, an area that represented what one historian termed "an important area of agreement in a negative sense," as both President Lincoln and the Thirty-eighth Congress agreed in denying the vote to African-Americans (Belz, p. 239). The issue of suffrage for African-Americans will be more fully treated in a subsequent section of this chapter focused on sociological undercurrents of American society affecting Reconstruction and the emergence of the Fourteenth Amendment. Finally, while the two plans differed, their areas of agreement showed that "Lincoln and Congress were

advancing in the same direction on the central issues of national power and the destruction of slavery” (Belz, p. 239). The differences centered on the question of who would effectively direct the national power as well as the question of how best to abolish slavery.

Lost in the jurisdictional battle for control of Reconstruction between the two Republican-dominated branches of government were the Democrats. Perhaps their opposition to the proposals for reconstructing the rebellious state governments during the Thirty-eighth Congress helps explain their loss of seats in the succeeding Thirty-ninth Congress. First, they “advocated the return of the rebel states without conditions” (Belz, p. 208). Attacking the Republican interpretation of the Guarantee Clause, congressional Democrats argued that “the standards of what constitute a republican government were set forth in 1789 and [that] the federal government cannot impose any new requirements,” e.g., loyalty to the Union, abolishing slavery (Wiecek, p. 186). Issuing a statement on reconstruction in July 1864, congressional Democrats “declared that neither the President by proclamation nor Congress by statute ‘can alter, add, or diminish the conditions of Union between the States’” (Belz, p. 209).

Representative James C. Allen, a Democrat from Illinois, argued that both the laws and constitutions of southern state states “have always been recognized by the Federal Government as republican in form and consonant with the principles of our Constitution” (Belz, p. 209). “Congress could not, argued Allen, initiate new governments or directly intervene in the affairs of the states, as the [Wade-Davis] reconstruction bill proposed” (Belz, p. 209). Representative Francis Kernan, a New York Democrat, put forth the state rights argument by declaring that the “Davis bill” was “at war with the principles upon which the Federal Government rests, and [was] subversive of the State governments and the reserved rights of the people of each State to change and administer them” (Belz, p. 209). Representative Aaron Harding, a Democrat from

Kentucky, attacked the very notion of reconstruction. According to Harding, “The very idea of reconstruction is an absurd and revolutionary idea, because it admits the dissolution of the Union. There can be no reconstruction of a State government that is still in existence” (Belz, p. 210). While both Democrats and Republicans agreed upon the need for republican governments, the Democrats

insisted that the rebel states met this requirement. Whereas Republicans defined republican government in terms of a state’s acceptance of the Constitution and the Union and of its hostility toward slavery, Democrats defined it as self-government. (Belz, p. 209)

The House of Representatives passed the Wade-Davis Bill by a 73-59 vote on May 4, 1864 (Belz, pp. 212-213). In the Senate the bill “was referred to the Committee on Territories, under Ben Wade” (Belz, p. 213). Senator Wade reported the bill out of committee “with amendments on May 27, but thereafter let the matter rest until the end of June” (Belz, p. 213). One of the amendments represented a significant change as it altered the suffrage requirements by removing the racial qualification of white voters, thus allowing “Negroes to vote and to participate in the reconstruction of loyal governments” (Belz, p. 217). During the month of June while Senator Wade let the Davis legislation rest, the Thirty-eighth Congress dealt with the matter of the Thirteenth Amendment to abolish slavery. Although it passed in the Senate by a 38-6 margin, House Republicans were unable to “muster the necessary two-thirds majority when the amendment came to a vote on June 15,” even though the vote received a 93-65 majority (Belz, pp. 215-216). Following the failure of the Thirteenth Amendment’s passage in Congress, “Wade favored eliminating the provision for Negro political equality, because he thought it would arouse opposition that would prevent the bill from passing” (Belz, p. 217). As a result, the Senate eliminated the amendment for African-American suffrage by a 5-24 vote (Belz, p. 217). Following a scenario of further Senate amendments, passage by the Senate, rejection of

the amended bill by the House, the failure to work out differences by a conference committee, the Senate with only one day left in the congressional session voted to withdraw its previous amendments to the Wade-Davis bill by an 18-14 vote, thereby passing the congressional version of the Reconstruction Bill (Belz, pp. 219-221).

The Wade-Davis Bill went to President Lincoln on the last day of the congressional session. Since Congress had passed the bill at the end of its session, the possibility of a pocket veto existed. According to Article 1, § 7, ¶ 2 of the Constitution:

If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Before the Wade-Davis Bill, Presidents had only used the pocket veto 19 times (Belz, n. 37, p. 224). President Lincoln utilized the pocket veto to kill the Wade-Davis Bill for several reasons. First, its requirement that reconstructed southern governments abolish slavery appeared to be unconstitutional. Speaking of the bill's prohibition of slavery, Lincoln remarked, "That is the point on which I doubt the authority of Congress to act" (Belz, p. 227). The Wade-Davis Bill also "contradicted [Lincoln's] reconstruction policy in Louisiana and Arkansas" (Belz, p. 226). Finally, in a Proclamation concerning Reconstruction, July 8, 1864, Lincoln stated another reason for pocket-vetoing the Wade-Davis Bill: Lincoln was "unprepared, by a formal approval of this Bill, to be inflexibly committed to any single plan of restoration" (Belz, p. 227).

The aftermath of the Wade-Davis Bill's passage and President Lincoln's pocket veto of the legislation resulted in a political "stalemate" whereby "loyal state governments" had been formed in Louisiana, Arkansas, and Tennessee by January 1865 according to the terms of Lincoln's Reconstruction Proclamation, but Congress refused "to seat Senators and Representatives from the states that had complied with [Lincoln's] terms" (Stamp, p. 40).

Congressional refusal to seat the Southern legislators, like Lincoln's pocket veto, was grounded in the Constitution. Article I, § 5, ¶ 1 of the Constitution stated, "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members...." "Thus," according to one historian, "at the time of Appomattox, the President and Congress seemed to have reached a stalemate" (Stampp, p. 40). Such was the situation when Lincoln was assassinated in April 1865. With the tactical removal of African-American suffrage for political reasons, the Wade-Davis Bill also "marked the point where antislavery Republicans passed from their old contention that republicanism forbade slavery to their new belief that republicanism required that the Negro be given the vote" (Wiecek, p. 187). Such an attitude impacted subsequent events surrounding the development of the Fourteenth Amendment.

*The battle between a republican congress and a democrat president over reconstruction.*

Finally, the political undercurrents of Reconstruction featured a political battle between President Johnson, a Tennessee Democrat, and the Republican-dominated Congress over what Reconstruction was going to be. In effect, it continued the previous jurisdictional battle between President Lincoln and Congress, a battle initially won by the President, but which had turned into a political stalemate. However, this second jurisdictional battle between the President and Congress differed from the previous battle over the shape of Reconstruction in that, as a result of the elections of 1864, Republicans now controlled enough seats in both legislative chambers to override any presidential veto. And although the radical Republicans were not the majority within their party, events subsequent to Johnson becoming President moved moderate Republicans to align with radical Republicans.

Late twenty century and early twenty-first century readers might be unfamiliar with how presidential inaugurations and newly-elected congresses operated prior to the ratification of the

Twentieth Amendment to the U.S. Constitution, known also as the “Lame Duck Amendment,” in 1933 (Monk, p. 243). Prior to the adoption of the Twentieth Amendment, the political system operated in the following manner because of the following rationale:

After the Constitution was ratified, the Congress – still acting under the Articles of Confederation – had set March 4, 1789, as the date on which the new president and members of Congress would be inaugurated. But that created a four-month period between the November elections and the March inaugurations in which lame ducks could obstruct the work of Congress, without being accountable to voters. However, Congress could not change the inauguration dates by mere statute, because the Constitution guaranteed the president and members of Congress a fixed term that could not be shortened without a constitutional amendment. (Monk, p. 243)

From the beginning of the Constitution until the Twentieth Amendment, Congress convened on the first Monday in December as stipulated by Article I, Section 4 of the Constitution. They generally adjourned on March 4th and didn’t reconvene until the following December unless the President called for a special session of Congress.

Following customary procedures that were grounded in both precedent and the Constitution, the Thirty-eighth Congress began its second and last session as a legislative body on the first Monday of December 1864 in a lame-duck session which treated the elections of 1864 as of no effect. The elections of 1864 would not take effect in congressional terms until the convening of the first session of the Thirty-ninth Congress on the first Monday of December in 1865, some thirteen months following the election. However, Lincoln did not want to wait until the Thirty-ninth Congress convened in order to pass the Thirteenth Amendment abolishing slavery. As Lincoln perceived the situation, such a wait might prove fatal in the event the war ended, thus terminating “the military authority of the Emancipation Proclamation,” an event that would “leave months of political dead time before Congress met, a time in which nearly anything could happen” (Guelzo, p. 400). The Thirteenth Amendment had been passed by the required



two-thirds majority in the Senate during the first session of the Thirty-eighth Congress, but had failed in the House because of opposition by House Democrats (Guelzo, p. 400). The elections of 1864 had solved the problem of Democratic opposition by replacing them, but the Thirty-ninth Congress would not meet until another year had passed.

In the last annual message he would deliver to Congress, President Lincoln asked Congress to reconsider the amendment that would abolish slavery. He urged reconsideration because “an intervening election show[ed] ... that the next Congress will pass the measure if this does not” (Message to Congress, December 6, 1864, in Gienapp, p. 213). While admitting that the election had not “imposed a duty on members to change their views or their votes,” the “voice of the people” had provided “an additional element to be considered” (Message to Congress, December 6, 1864, in Gienapp, p. 213). Pointing to the “great national crisis” and stating that “unanimity of action among those seeking a common end [was] desirable,” Lincoln tied the abolition of slavery to the common end of the war, which was “the maintenance of the Union” (Message to Congress, December 6, 1864, in Gienapp, p. 213). Lincoln reminded congressional legislators that “[t]he most reliable indication of public purpose in this country is derived through our popular elections” (Message to Congress, December 6, 1864, in Guelzo, p. 213). Lincoln concluded his address to Congress by stating his implacable opposition to slavery, linking the abolishment of slavery as an “indispensable condition to ending the war” (Message to Congress, December 6, 1864, in Gienapp, p. 215). According to Lincoln:

In presenting the abandonment of armed resistance to the national authority on the part of the insurgents, as the only indispensable condition to ending the war on the part of the government, I retract nothing heretofore said as to slavery. I repeat the declaration made a year ago, that “while I remain in my present position I shall not attempt to retract or modify the emancipation proclamation, nor shall I return to slavery any person who is free by the terms of that proclamation, or by any of the Acts of Congress.” If the people should, by whatever mode or means, make it an Executive duty to re-

enslave such persons, another, and not I, must be their instrument to perform it. (Message to Congress, December 6, 1864, in Gienapp, p. 215)

As it turned out, while Congress and Lincoln differed on Reconstruction, they did agree on the necessity to abolish slavery through a constitutional amendment. On January 6, 1865, Congress agreed to reconsider the amendment, “and Lincoln now moved his own engines of influence into high gear” (Guelzo, p. 401). Formerly, resistance had come from Northern Democrats and border-state hold-outs. To deal with this, “the secretaries were sent on their usual discreet embassies to unsure congressmen, while the more truculent border-staters were brought to the White House for personal interviews with the president” (Guelzo, p. 401). With some, Lincoln argued that the abolition of slavery would act to bring the war to a close. Others held out for lucrative appointments, which they received. The amendment’s passage was also aided by “the collapse of Northern Democratic morale after the election,” and a desire to “throw off the *proslavery* odium” as a hope for subsequent “Democratic ascendancy” (Guelzo, p. 401). The result was a narrow victory for the amendment in the House, described as follows: “A third of the House Democrats defected to Lincoln and, when the reconsidered amendment came to a vote on January 31, 1865, it sailed through the House with seven votes to spare” (Guelzo, p. 401). A historian quoted a radical Republican’s assessment of the amendment’s passage and the means by which it was achieved: “‘The greatest measure of the nineteenth century,’ remarked the canny Thaddeus Stevens, ‘was passed by corruption, aided and abetted by the purest man in America’” (Guelzo, p. 401).

And so, while the executive and legislative branches of government agreed on the need to abolish slavery, they still disagreed over the shape of Reconstruction as well as who should determine what shape Reconstruction would take. When the Thirty-eighth Congress adjourned

on March 4, 1865, they had not seated any representatives from southern states that had met Lincoln's requirements for readmission to the Union.

When Johnson became president upon Lincoln's assassination, he initially enjoyed the support of the dominant Republican party even though it would be over seven more months before the Republican-controlled Thirty-ninth Congress would convene in legislative session. As one of his first tasks, the new president met with his former Republican colleagues who had served with him on the Committee on the Conduct of the War. From the Republican perspective, the meeting was "most satisfactory," primarily because the Republicans "did most of the talking" while "Johnson listened with apparent sympathy" (Stampp, p. 52). Near the end of the meeting, Senator Wade concluded, "Johnson, we have faith in you. By the gods, there will be no trouble now in running the government" (Stampp, p. 52). The Republicans' perception of the meeting and of forthcoming events was summarized by a noted historian of Reconstruction:

The radicals departed assuming that the governments Lincoln had organized in four southern states would be repudiated, that the Cabinet would be reorganized, that a few dozen leading rebels would be brought to trial, and that either Congress would be called into special session or political reconstruction would be delayed until Congress met in regular session the following December. (Stampp, p. 52)

The reality, however, was quite different as Johnson determined to follow Lincoln's idea that the executive branch of government should determine the form and content of Reconstruction.

Following his meeting with the Committee on the Conduct of the War, President Johnson "responded with a series of public statements and executive proclamations that left the radicals momentarily stunned" (Stampp, p. 61). The reality of Johnson's intentions emerged to present something quite different from radical Republican perceptions of Johnson's position:

The new President, it now appeared, was as convinced as Lincoln had been that reconstruction was the responsibility of the Executive Department and not of Congress. He did not propose to call Congress into special session, or

to delay reconstruction until December when Congress would meet in regular session. Rather, he would start and finish it in the seven months before Congress assembled and then present Congress with a *fait accompli*. (Stampp, pp. 61-62)

One historian marked the beginning of radical Republican disenchantment with President Johnson as commencing at the end of May, 1865, by drawing attention to a specific presidential proclamation.

But the honeymoon between Johnson and the radicals ended when the President, on May 29, 1865, issued a proclamation on North Carolina reconstruction which excluded Negroes from suffrage. Profoundly disappointed, the radicals did not give up relying on him or start opposing the administration, but their disenchantment with him began. (Belz, p. 306)

Moreover, Johnson's perceptions of the nature of Reconstruction conflicted with those of radical Republicans, and eventually, showed a lack of understanding of the war's essential purpose. While Congress talked of reconstructing the South, Johnson's preferred terminology was "restoration" (Brogan, p. 361). As part of his plan to complete the restoration of the southern states to the Union before Congress convened in December, Johnson issued instructions to the defeated secessionists to "elect conventions to draw up state constitutions, which would next be ratified by the voters" in time for fall elections to select senators and representatives for the forthcoming congressional session in December (Brogan, p. 361). At the same time, Johnson started issuing large numbers of pardons to Confederate secessionists. As one historian described the situation, "Soon it was plain that, armed with their pardons, former Confederate leaders were re-entering politics in force, and after the autumn elections would completely dominate the new Johnson-inspired Southern state governments" (Brogan, p. 361).

Hand in hand with his plans for southern restoration, Johnson was issuing statements defending the idea of states' rights, an action taken that illustrated "how little he understood the significance of the great struggle that had just occurred" (Brogan, p. 360). Johnson's statements

flew in the face of in spite of northern opinion that the war had been precipitated by extreme views of states' rights and that the defenders of states' rights had just been defeated in a bitterly long and costly war. Along with his defense of states' rights, Johnson attempted to limit a congressional power legitimized by the Constitution regarding the seating of Senators and Representatives (See previous section regarding the stalemate between President Lincoln and Congress). According to Johnson, Congress could not legislate the reconstruction of the secessionist southern states without southern participation in that effort.

Within very broad limits, he said, the Constitution respected states' rights. Once a rebel state accepted those limits, it had put itself in harmony with the law and the nation again and could not be denied re-admission to Congress.... [N]or might Congress legislate on matters affecting their interests while their Representatives and Senators were absent. In practice this meant that the future of the Southern blacks could not be settled until after the white South had regained all its old political rights and privileges. (Brogan, p. 360)

Subsequent to his efforts to change reconstruction to restoration and simultaneous with his efforts to exclude congressional involvement in that program, events in the South combined to discredit Johnson's program in the eyes of many northerners during the summer and fall of 1865. First, there was a general pattern of violent acts directed against individual black people by southern whites, which was described by one historian specializing in the history of the period as follows:

The whites intensely resented the presence of Negro troops in the South; the more brutal whites committed countless acts of violence against the freedmen; and men of all classes considered any deviation on the part of Negroes from the subservience of slavery days as "insolence." (Woodward, 1960, 1968, p. 75)

Another historian commented on the violence occurring during the summer and fall of 1865 that continued through the summer of 1866, culminating in the race riots in Memphis in April 1866 "when forty-six blacks were killed, and the massacre of 30 July in the same year at New Orleans,

when approximately forty people were killed” by observing, “[T]he struggle between Congress and President over the future of the South from the start took place against a background of brutal conflict” (Brogan, p. 362). On Christmas Eve, 1865, southern whites founded the Ku Klux Klan in Pulaski, Tennessee (Brogan, p. 362).

Second, against this background of violence directed against the newly freed slaves, northerners witnessed the recalcitrance of southerners in resisting the full implementation of Johnson’s program of restoration. One form of recalcitrance centered on northern demands for southern states to repudiate secession as illegal, to ratify the Thirteenth Amendment, and to repudiate the Confederate war debt. According to a leading historian of the period:

Several southern conventions still would not agree that secession had been illegal; therefore, they merely repealed, rather than repudiated, the ordinances of secession and thus yielded nothing in principle. The Johnson legislature in Arkansas voted pensions for Confederate veterans; Mississippi refused to ratify the Thirteenth Amendment; South Carolina refused to repudiate the Confederate debt. (Stampp, pp. 76-77)

Another form of recalcitrance centered on southern efforts to effectually negate Lincoln’s Emancipation Proclamation, the ensuing military emancipation of slaves by Union troops, and the Thirteenth Amendment abolishing slavery and involuntary servitude through the infamous Black Codes, a series of laws that were “framed to control the Negroes and severely restrict their civil rights” and which returned the former slaves “to a modified form of involuntary servitude” (Stampp, pp. 79, 80; see also previous p. 752 and n. 95 of this document). As described by one historian, the “crucial point about these [Black C]odes was their ultimate purpose” (Stampp, p. 79). He continued:

They were not designed to help the Negro through the admittedly difficult transition from the status of slave to that of a responsible freeman. They were not intended to prepare him for a constructive role in the social, political, and economic life of the South. Few believed that such a role was possible. Rather, the purpose of the Black Codes was to keep the Negro, as

long as possible, exactly what he was: a propertyless rural laborer under strict controls, without political rights, and with inferior legal rights. (Stampp, p. 79)

All of the Johnson restoration governments in the South “restricted the suffrage to the whites” (Stampp, p. 78). Education was also withheld from former slaves. As reported by Carl Schurz, “Hundreds of times I heard the old assertion repeated, that ‘learning will spoil the nigger for work,’ and that ‘negro education will be the ruin of the South’” (Stampp, p. 78). Schurz gathered these remarks as a result of being sent by President Johnson to tour the South in order to observe conditions (Stampp, p. 73). As articulated by a delegate to the Texas constitutional convention, “I concede them [former slaves] nothing but the station of ‘hewers of wood and drawers of water,’” referencing the Israelites’ response to the deception perpetrated upon Joshua’s forces by the Gibeonites (Stampp, p. 78; for Judaeo-Christian scriptural reference, see Joshua 9:3-27 in the Hebrew Scriptures). While designed “to assure the whites of a perpetual supply of cheap labor,” the Black Codes “also reflected their [whites] belief that the Negro had the capacity for nothing better” (Stampp, p. 79). An English historian summarized the situation:

Slavery was dead, but slavery was what the Africans were meant for, and something as near as possible to slavery was what they were going to get. The South might have been defeated in war, but her resources for racial oppression were by no means exhausted. (Brogan, p. 362)

The political ramifications of southern recalcitrance to the changed circumstances wrought by their defeat in a bloody civil war centered on two northern concerns: first, control of Congress; and second, domination of the Johnson restoration governments by the politicians who had perpetrated treasonous secession which, in turn, had precipitated a costly civil war. Both concerns not only interlocked, but were viewed as aided and abetted by President Johnson. Johnson’s extensive pardons of former Confederates meant they continued to dominate the newly formed state governments created by Johnson’s program of restoration. That, plus the

massive disenfranchisement of black voters created a frightening prospect, southern domination of Congress. The newly freed slaves would no longer be counted as three-fifths of a person as specified by the former Constitution because of the passage of the Thirteenth Amendment abolishing that category. Instead each former slave would be counted as one person, but still would not have the vote as a result of the Black Codes' restriction of the vote to whites only. As a result the Southern delegation in the House of Representatives would increase "by some thirteen members, since all of the freedmen instead of three-fifths would have been counted in apportionment" (Woodward, 1960, 1968, p. 94). Other ramifications of Johnson's pardons, of Confederate domination of the Johnson restoration governments, and of the newly legislated Black Codes followed:

Without Negro ballots it was probable that all the additional seats, plus all the rest of the seats of the eleven states, would be filled by Democrats and not Republicans. These same states would not only swell the opposition votes in Congress but the electoral votes in presidential contests. (Woodward, 1960, 1968, p. 94)

As a result:

About thirty-seven of the Southern seats in the House would be accounted for by Negro population, who had no votes, and likely filled by sworn opponents of the party that took credit for Negro freedom. To ask an overwhelmingly Republican Congress – radical or conservative – to approve such a plan was to ask water to run uphill. (Woodward, 1960, 1968, p. 94)

And although many northern states denied the franchise to black voters, restrictions on African-Americans were not codified to the extent represented by the Black Codes (See ensuing section of this chapter, "Sociological Undercurrents," for a fuller discussion regarding denial of the vote to African-American citizens in northern states). Moreover, the moral high ground resulting from the abolition of southern slavery was still occupied by the North. Finally, all Republicans, both moderate and radical, "were afraid that southern and western agrarians might once more



combine in the Democratic party, for this was the alliance that had dominated national politics most of the time in prewar years” (Stampp, p. 93). The increased southern representation and possible alliance with western agrarians were unacceptable, particularly for radical Republicans. “This, said the radicals bitterly, would be the South’s reward for her treason” (Stampp, p. 93)!

As President, Johnson “had acquiesced in the Black Codes without a murmur” (Stampp, p. 81). Because of his views on states’ rights, Johnson “presumably ... felt that the states, however unwise, were acting within their constitutional rights. So he said nothing: it was not for him to interfere” (Brogan, p. 363). And so, he didn’t interfere with the southern legislatures’ enactment of the Black Codes, nor did he interfere when the Union “military commanders in the South nullified the codes” (Brogan, p. 363). Northern African-Americans held “numerous meetings” in response to the southern Black Codes and called “on Congress for protection” (Stampp, p. 80). The *Chicago Tribune* articulated northern views when it “warned Mississippi that the North would convert her ‘into a frog pond’ before permitting slavery to be re-established” (Stampp, p. 80). This public opposition in the North perhaps explains why “military officers suspended much of the Mississippi code and threw out the entire South Carolina code” (Stampp, p. 81).

Thus the stage was set for the convening of the first session of Congress, a Congress that had actually been elected in November of 1864, but which would not officially meet until the first Monday in December that occurred on the 4th of December, 1865. As a result of the elections of 1864, the Thirty-ninth Congress “contained four roughly defined political groups” (Stampp, p. 83):

First, there was a small, disorganized, demoralized Democratic minority....  
 Second, there was a rather feeble band of conservative Republicans....  
 Third, there was a faction of radical Republicans, more numerous than either of the first two groups but still a decided minority even in the Republican

party. Among those who could be identified clearly as radicals [was] ... [Representative] James F. Wilson of Iowa. Finally, there were the moderate Republicans – the largest group in this Congress – who leaned slightly toward Johnson but were nevertheless still wavering between the radical and conservative camps.... The moderate Republicans held the balance of power; whichever group they gravitated toward would ultimately win control of Congress. (Stampp, pp. 83-84)

Over the intervening months, elements of the moderate Republican majority had slowly begun moving towards acceptance of the views of the Radical Republicans, views with which they had not agreed when Johnson took office following Lincoln's assassination, but which had gained increasing acceptance as the North witnessed the actions of an unrepentant South. However, when the Thirty-ninth Congress first convened, moderate Republicans "were still hopeful that conflict between Congress and the President could be avoided" (Stampp, p. 85). To keep the moderate Republicans "within his grasp," however, Johnson would have had to have exercised prudence and flexibility in his approach to reconstruction (Stampp, p. 84). President Johnson also had to hope that "those who controlled his governments in the South would ... use some discretion" (Stampp, p. 85). The reality proved quite different.

Instead, the President's tactless, uncompromising, and violent behavior, and the southern politicians' indifference to northern public opinion, eventually forced the moderates into an alliance with the radicals. Consequently, by the summer of 1866 the radicals, with their new recruits, had control of Congress and were finally in a position to assume the direction of reconstruction themselves. (Stampp, pp. 85-86)

At the same time another important constituency, northern business interests, had moved to a position of supporting the radical Republican views on the need to reconstruct the South. This "powerful group saw in the return of a disaffected and Democratic South a menace to the economic order that had been established during the absence of the seceding states from the Union" (Woodward, 1960, 1968, p. 96).

On nearly every delicate and disturbing economic issue of the day – taxation, the National Bank, the national debt, government bonds and their funding, railroads and their financing, regulation of corporations, government grants and subsidies to business, protective tariff legislation – on one and all the business community recognized in the unreconstructed South an antagonist of long standing. (Woodward, 1960, 1968, p. 96)

Like both moderate and radical Republicans, but for slightly different reasons, northern business interests feared an alliance of a more numerous southern representation in Congress with traditional northern Democrats.

In combination with traditional allies in the West and North, the South could upset the new order. Under these circumstances, the Northern business community, except for the banking and mercantile interests allied with the Democrats, put aside conservative habits and politics and threw its support to Radical Reconstruction. (Woodward, 1960, 1968, p. 96)

The confluence of economic interests and politics during this period was summarized by another leading historian of the era:

The Republican party had become, in part, the political agency of the northern middle classes and of northern business enterprise.... [T]he agrarian interests in the South and West, ever suspicious of bankers, capitalists, and urban entrepreneurs generally, posed a serious threat to the economic groups the Republican party represented and to the legislation passed for their benefit. (Stampp, p. 95)

While moderate and radical Republicans were divided over the exact program to be used in reconstructing the South, they were united in believing that Congress should control that program. Just as the Thirty-eighth Congress had refused to seat those elected by Lincoln's southern reconstruction governments, so the Thirty-ninth Congress also refused to recognize "the Southern representatives and senators chosen under the Johnson-sanctioned" restoration governments because both "the legality and desirability of those very constitutions was one of the key matters at issue" (Brogan, p. 363). These actions were entirely within the constitutional powers of Congress as specified in Article I, § 4, ¶ 3 despite Johnson's denunciations of

congressional action as being unconstitutional (Brogan, pp. 363-364; see also previous discussion in this chapter, pp. 761-762). As described by one historian, “As Congress began to take a hand, Johnson’s control over the process of reconstruction came to an end” (Stampp, p. 81). Setting its hand on the tiller of the ship of state regarding the content and direction of reconstruction, the Thirty-ninth Congress “express[ed] the boiling indignation of the North ... [by] denounc[ing] the South and set[ting] up a joint committee of the two houses to propose a programme [sic] of congressional reconstruction” (Brogan, p. 363). While not all Republicans, let alone white Northerners, shared the radical Republican statement of Charles Sumner that “[t]he South ... must be reconstructed in accordance with the principles of the Declaration of Independence, with government founded upon the consent of the governed,” most did agree with Senator Henry Wilson’s rebuttal of the Black Codes as a purpose of reconstruction (Stampp, p. 88):

[W]e must see to it that the man made free by the Constitution ... is a freeman indeed; that he can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the ... common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man. (Stampp, p. 88)

Out of these initial actions emerged the later, more substantive legislation developed by the Joint Committee on Reconstruction of the Thirty-ninth Congress, namely the Civil Rights Act of 1866 (See previous section of this chapter, pp. 752-753) and the Fourteenth Amendment. The congressional override on April 9, 1865, of Johnson’s veto of the 1866 Civil Rights Act by more than the two-thirds majority required in each legislative chamber signaled that Congress would determine the nature and shape of Reconstruction, not the President (Brogan, p. 364; Patrick, pp. 73-74; Stampp, p. 135; Woodward, 1960, 1968, pp. 77-78).

The emergence of the Fourteenth Amendment and its passage will be considered following extensive discussion of the psychological, sociological, and economic undercurrents of Reconstruction. As stated previously, understanding of underlying societal forces at work illuminates the Fourteenth Amendment's origins and purpose.

***Psychological undercurrents.***

*Victor v. vanquished.*

The substrata constituting the psychological undercurrents of American life in the immediate aftermath of the Civil War center on the theme, "Victor v. Vanquished." As a result of the Civil War, the South suffered damage to its collective psyche:

For the South had undergone an experience that it could share with no other part of America – though it is shared by nearly all the peoples of Europe and Asia – the experience of military defeat, occupation, and reconstruction.  
(Woodward, 1960, 1968, p. 190)

An English historian described the psychological impact of defeat in the following manner:

Southern bitterness ran deep. Defeat was educative to the extent that it induced Southerners to become Americans again ... and persuaded many of them that the section would have to make a serious effort to industrialize... It would be long before anyone would accept that the whole secessionist adventure might have been morally wrong, socially unwise, politically misconceived. (Brogan, pp. 361-362)

An American historian further described southern reaction to the defeat they had suffered at the hands of the northern victors.

[A] large number of Southerners were bitter in defeat; few of them would have agreed that what they had done in 1861 was morally wrong, or that the right had triumphed.... Schurz found among the southern people 'an utter absence of national feeling.' Loyalty consisted of 'submission to necessity,' and submission was advocated as 'the only means by which they could rid themselves of the federal soldiers and obtain once more control of their own affairs.' Certainly Southerners were not conceding any more than they had to. (Stampp, p. 74)

Furthermore, the psychological impact endured beyond the generation that had experienced defeat.

Southern women, particularly, remained ferociously loyal to “the cause.” Mourning and commemoration were to be major preoccupations for several generations to come: soon war-memorials appeared in every important Southern town, usually in the form of a statue of a boy in grey, his heroic young face staring resolutely northwards. (Brogan, p. 362)

The North viewed the outcome of the Civil War in a quite different light. More than any single individual, Abraham Lincoln framed the conflict in terms of a noble crusade for freedom that could only be waged by a free government. Sometimes Lincoln added the idea of divine providence. According to Lincoln, “Let us have faith that right makes might, and in that faith, let us, to the end dare to do our duty as we understand it” (Speech at the Cooper Union, February 27, 1860, in Gienapp, p. 81). In his inaugural address, Lincoln declared, “Intelligence, patriotism, Christianity, and a firm reliance on Him, who has never yet forsaken this favored land, are still competent to adjust, in the best way, all our present difficulty” (First Inaugural Address, March 4, 1861, in Gienapp, p. 96). In his message to a special session of Congress, Lincoln portrayed the coming conflict as part of the struggle to preserve democracy.

This is essentially a People’s contest. On the side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men – to lift artificial weights from all shoulders – to clear the paths of laudable pursuit for all – to afford all, an unfettered start, and a fair chance, in the race of life. (Message to Congress, July 4, 1861, in Gienapp, p. 105)

Following the momentous clash between the North and the South at Gettysburg, Lincoln again framed the conflict as a struggle to maintain a government dedicated to liberty, but now added the idea first expressed in the nation’s founding document.

Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. (Gettysburg Address, November 19, 1863, in Gienapp, p. 184)

Lincoln concluded his remarks at Gettysburg by exhorting the North to not only remember the cause for which they were fighting, but also to re-dedicate themselves to that cause.

It is rather for us to be here dedicated to the great task remaining before us – that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion – that we here highly resolve that these dead shall not have died in vain – that this nation, under God, shall have a new birth of freedom – and that government of the people, by the people, for the people, shall not perish from the earth. (Gettysburg Address, November 19, 1863, in Gienapp, p. 184)

Finally, according to Lincoln, the South was fighting to maintain slavery, not freedom.

One eighth of the whole population were colored slaves, not distributed generally over the Union, but localized in the Southern part of it. These slaves constituted a peculiar and powerful interest. All knew that this interest was, somehow, the cause of the war. To strengthen, perpetuate, and extend this interest was the object for which the insurgents would rend the Union, even by war... (Second Inaugural Address, March 4, 1865, in Gienapp, pp. 220-221)

It was not simply a issue of the North being victorious; instead it was a triumph that reflected divine intervention on behalf of the northern armies. The sufferings and defeats of the North during the Civil War served as payment for the North's previous toleration of slavery. In articulating this view, Lincoln began by paraphrasing scripture, "Woe unto the world because of offences! for [sic] it must needs be that offences come; but woe to that man by whom the offence cometh!" (Second Inaugural Address, March 4, 1865, in Gienapp, p. 221). Lincoln next identified "American Slavery [as] one of those offences which, in the providence of God, must needs come" and the bloody conflict between North and South "as the woe due to those by whom the offence came" (Second Inaugural Address, March 4, 1865, in Gienapp, p. 221). Lincoln then prayed "that this mighty scourge of war may speedily pass away" before declaring:

Yet, if God wills that it continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord, are true and righteous altogether." (Second Inaugural Address, March 4, 1865, in Gienapp, p. 221)

The lyrics of the Union army's "major war song," *The Battle Hymn of the Republic*, reinforced the righteousness of the Northern cause: "As He died to make men holy, let us die to make men free!" (Filler, 1977a, p. 366).

*Hearts and minds, feelings and beliefs.*

With the ultimate victory of Northern armies over the Southern rebels and defenders of slavery, with the triumph of the Union over those who placed the preservation of slavery ahead of the preservation of the Union, "right had given might" to Northern arms, at least in the eyes of most Northerners. The outcome also helped contribute to the "American legend of success and victory," which in turn "fostered the tacit conviction that American ideals, values, and principles inevitably prevail in the end" (Woodward, 1960, 1968, pp. 188, 189).

Although the military conflict had ended, the beliefs, feelings, and attitudes that had driven the conflict still remained. And those feelings ran deep on both sides. While forced to submit to the Union's military triumph, Southern beliefs in white supremacy remained unshaken.

As described by one historian:

[Southerners'] submission was to military might, not to right and truth as they defined right and truth.... Submit they would to northern power but they would retain their ideas of a South governed for and by white men. Although willing to admit the demise of slavery and the permanency of the Union, they would go no further. Already the "Lost Cause" was becoming ennobled and its heroes enshrined.... Southerners wanted to know what to do – how to convince the victor of their loyalty and still keep the South a white man's land. (Patrick, p. 61)



Southerners received encouragement for their attitude of superiority towards the former slaves from no less a person than the President of the United States. Speaking to Congress, President Johnson “in effect, demanded that the South remain a ‘white man’s country’” (Stampp, p. 87).

Specifically, President Johnson observed:

[I]t must be acknowledged that in the progress of nations negroes have shown less capacity for government than any other race of people. No independent government of any form has ever been successful in their hands. On the contrary, wherever they have been left to their own devices they have shown a constant tendency to relapse into barbarism. (Stampp, p. 87)

Johnson concluded by characterizing the attitudes of radical Republicans towards the newly freed African-Americans as a danger to the nation:

The great difference between the two races in physical, mental, and moral characteristics will prevent an amalgamation or fusion of them together in one homogeneous mass.... Of all the dangers which our nation has yet encountered, none are equal to those which must result from the success of the effort now making to Africanize the [southern] half of our country. (Stampp, p. 87)

The President’s views were not that different from the views expressed in the “Official charge” given to new recruits of the Ku Klux Klan in 1867:

Our main and fundamental objective is the MAINTENANCE OF THE SUPREMACY OF THE WHITE RACE in this Republic. History and Physiology [sic] teach us that we belong to a race which nature has endowed with an evident superiority over all other races, and that the Maker, in thus elevating us above the common standard of human creation, has intended to give us over inferior races a dominion from which no human laws can permanently derogate. (Emphasis in original) (Brogan, p. 356)

In addition to the desire of white southerners to maintain white supremacy in southern political, social, and economic life, there was hatred and bitterness of the North mixed in as well, exemplified by the statement of one South Carolinian, who declared, “[The Yankees] left me one inestimable privilege, to hate ‘em. I git [sic] up at half past four in the morning and sit up till

twelve at night, to hate ‘em” (Patrick, p. 62). In response to northern denunciations of the Black Codes passed by southern legislatures, newspaper editors in the South “removed the flag, a symbol of the Union, from their editorial columns and described the Northerners in bitter words” (Patrick, p. 62).

The views of the editor of the *Chicago Tribune* were typical of the northern response to the southern Black Codes. He wrote:

We tell the white men of Mississippi that the men of the North will convert the State of Mississippi into a frog pond before they will allow such laws [the Black Codes] to disgrace one foot of soil in which the bones of our soldiers sleep and over which the flag of freedom waves. (Brogan, p. 373; Patrick, p. 61)

Radical Republicans constituted perhaps the most outspoken northern voices in their negative views of the southern enemy. Senator Charles Sumner of Massachusetts “declared that the South had been allowed to surrender too soon” while Wendell Phillips, a longtime opponent of slavery and an early abolitionist, observed that southerners were still continuing to fight the North. According to Phillips, “The rebellion has not ceased, it has only changed its weapons. Once it fought; now it intrigues; once it followed Lee in arms, now it follows President Johnson in guile and chicanery” (Patrick, p. 61). Congressman Thaddeus Stevens of Pennsylvania expressed the views of the victorious North when he declared, “We have the right to treat them [the South] as we would any other provinces that we might conquer” (Brogan, p. 356). Stevens further remarked that having seceded and having “been given belligerent rights” during the war, the former southern states “were now conquered provinces ‘subject to all the liabilities of a vanquished foe” (Stampp, p. 86). Asserting congressional power, Stevens declared that “Congress alone had the power to rebuild the southern states” (Stampp, p. 86). Stevens then asserted sole congressional power “to admit them [the seceded southern states] into the Union, if

they should be judged fit to resume the privileges which they renounced and sought to destroy” (Stampp, p. 86). Described as the “master of the Republican House majority, and leader of Radical Reconstruction,” Congressman Stevens also advocated for the disenfranchisement “of Southern whites in great numbers” and pushed “to confiscate great quantities of their land” (Woodward, 1960, 1968, pp. 91, 91-92). Describing his plan, Stevens declared, “It is intended to revolutionize their feelings and principles. This may startle feeble minds and shake weak nerves. So do all great improvements” (Woodward, 1960, 1968, p. 92). Responding to critics who described his plan as “humiliating [a] defeated foe,” Stevens rejoined: “Why not? Do not they deserve humiliation? If they do not, who does? What criminal, what felon deserves it more” (Stampp, p. 92)? An English professor of history described the northern perspective towards the South in the aftermath of the Civil War:

The North had won; but the victory would be hollow if the ex-Confederates renewed their system of racial oppression and, on that foundation, once more challenged the dearest interests and beliefs of their fellow-citizens. (Brogan, p. 358)

He continued by describing northern concerns about the South and the rationale they used to justify their views:

Lincoln and the rest had surely not died in vain; but it might seem so if justice was not done to the former bondsmen. And should not the South be disciplined? Was it not a just punishment, as well as prudent, to compel her to abandon her old ways? (Brogan, p. 358)

#### *Congressional reconstruction.*

Northern views on victory clashed with southern resistance to changed circumstances, which ultimately reinforced the position of Radical Republicans and began a series of events that became known as Reconstruction. Reconstruction would hold sway until the aftermath of the presidential election of 1876 in which the election’s outcome was decided politically by the

House of Representatives. The resulting Compromise of 1877 officially ended the federal government's efforts to "reconstruct" the South. In between the convening of the Thirty-ninth Congress and the Compromise of 1877, however, a series of earth-shaking events in the social, political, and economic life of the nation emerged that exerted a far-reaching influence on our national life. These profound events emerged from and were influenced by the postwar conflict between the victorious North and the vanquished South.

The Thirty-ninth Congress convened on December 4, 1865, some thirteen months following the elections of 1864. The Speaker of the House, Schuyler Colfax of Indiana,

pointed to the opposition in some southern legislatures to ratification of the Thirteenth Amendment, their reluctance to repudiate wartime debts, and their repeal rather than repudiation of secession, the proscription of southern Unionists by former Confederates, and the latter's failure to protect the freedmen. He proclaimed the exclusive right of Congress to judge the qualifications and elections of its members. (Patrick, p. 63)

Prior to the congressional session, a moderate northern newspaper, the *New York Times*, cautioned against admitting congressmen from the southern states to the Thirty-ninth Congress because such action "would signify the end of reconstruction" (Patrick, p. 62). The *Times* "advised northern congressmen to delay, wait, investigate, and determine whether the southern state governments were actually loyal" (Patrick, p. 63). Earlier that fall, the clerk of the House of Representatives, Edward McPherson, had "announced his intention to omit calling the names of representatives from the former Confederate states at the opening session of the Thirty-Ninth [sic] Congress" (Patrick, p. 63). With the approval of Speaker Colfax, McPherson followed his announced policy when the Thirty-ninth Congress convened and did not call the names of southern representatives, an action which prevented them from being seated. The Senate used the same tactic to prevent the seating of southern senators (Patrick, pp. 63-64). Also on the first day, Thaddeus Stevens of Pennsylvania

moved for the appointment of a joint committee, composed of nine members from the House and six from the Senate, to inquire into conditions of the states formerly known as the Confederate States of America and to report whether those states were entitled to representation in Congress. (Patrick, p. 64)

Stevens also declared that “no representative or senator from the states in question [should] be seated” until the committee had completed their investigation and delivered its report to Congress (Patrick, p. 64).

The House approved Stevens’ motion that same day “by a 136-36 vote” with the Senate also voting approval on December 4, 1865 (Patrick, p. 64). Subsequently, six senators and nine representatives were appointed to the Joint Committee on Reconstruction (See Table 4).<sup>99</sup> Containing four moderate Republicans, eight radical Republicans, and three Democrats, the Joint Committee was chaired by Senator Fessenden who both directed the Joint Committee’s investigation and authored its final report while Representative Stevens served as the chair of the “House section of the Committee” (Patrick, p. 65).

*Table 4:  
Members of the Joint Committee on Reconstruction*

<u>Senate</u>	<u>House of Representatives</u>
William Fessenden – Maine	Thaddeus Stevens – Pennsylvania
J.W. Grimes – Iowa	John A. Bingham – Ohio
Ira Harris – New York	Henry T. Blow – Missouri
J.M. Howard – Michigan	George S. Boutwell – Massachusetts
Reverdy Johnson – Maryland	Roscoe Conkling – New York
G.H. Williams – Oregon	Henry Grider – Kentucky
	Justin S. Morrill – Vermont
	Andrew J. Rogers – New Jersey
	Elihu B. Washburne – Illinois

Moderate Republicans controlled the Joint Committee on Reconstruction as it began its work, “meeting almost daily” from December, 1865 through April, 1866 (Stampp, p. 111). In

conducting its investigation into conditions in the southern states, the Joint Committee called numerous witnesses, among whom were “77 Northerners living in the South, 57 Southerners, and 8 Negroes” (Patrick, p. 65). Senator Fessenden wrote the report of the Joint Committee’s findings which was released on April 28, 1866 (Stampp, p. 111). Findings of the Joint Committee on Reconstruction included the following:

White Southerners were mistreating the freedmen by relegating them to a servile economic and political status, proscribing members of the white race who had been Unionists during the war, and continuing in power state governments dedicated to white supremacy and controlled by former secessionists and Confederates. (Patrick, pp. 65-66)

The Joint Committee also determined that the secessionist states were “disorganized communities without civil governments” at the end of the war; therefore the rebellious states “lacked constituencies qualified to elect Senators and Representatives” (Stampp, p. 111).

Because the “majority of Southerners were still bitterly hostile to the government of the United States,” and “until the civil rights of all their citizens were secured and until the leaders of the rebellion had been excluded from public offices,” the Southern states were “not entitled to representation in Congress” (Stampp, p. 111).

Because northern newspapers had covered the Joint Committee’s hearings and reported its findings in great detail, the congressional investigation into southern conditions “profoundly influenced public opinion in the North and persuaded an increasing number of Northerners to support a more rigorous policy” (Patrick, p. 66). Through reading their newspapers, a vast number of “Northerners concluded that Southerners remained essentially rebellious and anti-American while voicing sentiments of loyalty, that freedmen were being virtually re-enslaved by law and practice” (Patrick, p. 66).

The effects of the hearings conducted by the Joint Committee on Reconstruction and their widespread publicity generated by northern newspapers were far-reaching. Out of the Joint Committee's hearings emerged the Civil Rights Act of 1866, the reauthorization of the Freedmen's Bureau, and the introduction of the Fourteenth Amendment. The Joint Committee's hearings also influenced the outcome of the mid-term elections of 1866 that resulted in even greater numbers of Republican legislators being elected to Congress. One historian described the election of 1866 in the following manner:

On election day the people rejected Johnson's claim that reconstruction was finished and voted to have Congress proceed along whatever line it chose to establish loyal governments in ten southern states. Every governorship in the northern states went to the Republicans and they also won more than a two-thirds majority in both houses of Congress. Only in the border states of Delaware, Maryland, and Kentucky did the Democrats score victories. (Patrick, p. 89)

In turn, the election of 1866 exerted further impact upon the nation's political landscape. First, the lame-duck second session of the Thirty-ninth Congress enacted legislation on January 22, 1867, stipulating that "the first session of the Fortieth Congress [resulting from the mid-term elections of 1866], and of Congresses in the future, was to begin on March 4, following elections of the preceding year" (Patrick, p. 92). This action eliminated the thirteen-month delay between an election and the actual seating of elected legislators, described as "a long period in which the executive department could operate with no check from the legislative branch" (Patrick, p. 92).

Second, while the hearings of the Joint Committee on Reconstruction indicated to the northern public the need for sterner measures by the North to create governments in the South that were loyal to the Union, the election of 1866 reflected widespread support for stiffer congressional efforts designed to bring the defeated, but recalcitrant, southerners back into line. As a result, Congress's first official Reconstruction act "divided the South into five military

districts, each to be governed by a general of the US army” (Brogan, p. 370). Furthermore, in similar fashion to an army of occupation overseeing the conversion of a conquered people to democratic processes, the Military Reconstruction Act provided for the following:

These generals had the duty of enrolling all qualified voters (in effect, all adult males, except those classes of ex-Confederates excluded by the terms of the Fourteenth Amendment), of calling together constitutional conventions which would set up new, acceptable state governments and to preside over the first elections under these arrangements. (Brogan, p. 370)

The provisions of the Military Reconstruction Act of March 2, 1867, also included terms under which the military regimes would give way to civilian rule:

Then, when the new governments had ratified the Fourteenth Amendment and Congress had approved the new constitutions, the reconstructed states would be at last re-admitted to the federal legislature and the military regimes could fade away. (Brogan, p. 370)

One student of constitutional history viewed the Military Reconstruction Act as constituting the high water mark of the Guarantee Clause’s influence in American history. According to Professor Wiecek:

The clause emerged, stood forward for a time in nearly all its inherent power ... [reflecting the North’s] determination to hold the people of the southern states to a strict account as the price of readmission to full rights in the Union. (Wiecek, p. 208)

In his view:

Reconstruction represented the confluence of two earlier streams of interpretation of the guarantee clause. One was the old antislavery argument that slavery and republican government were incompatible.... This stream of interpretation was commingled with the second which insisted that the essence of republican government was popular control of the machinery of government. (Wiecek, p. 208)

Did the sterner measures, continued military occupation of a conquered province as represented by the Military Reconstruction Act, work? As analyzed by a British historian, the military rule was required to overcome the “ferocious” opposition to the changed status of the newly freed



slaves that was posed by the former secessionists (Brogan, p. 370). In his view, “By 1870 the process was complete to the Republicans’ satisfaction, and every Southern state was once more represented in Congress” (Brogan, p. 370). Brogan identified another benefit of the carefully monitored development of the new state constitutions required by the Military Reconstruction Act. According to his analysis:

The new state constitutions did effectively overhaul Southern government.... Property qualifications for voting and office-holding were abolished for ever; [and] the first systems of public education were set up, for whites as well as for blacks, that the South had ever known... (Brogan, p. 372)

Because public education in the South emerged from military rule by the victorious North over the vanquished southern states, it represents a unique phenomenon whose effects endured well beyond the generation who participated in both the Civil War and Reconstruction.

*Public education.*

Northern and southern attitudes towards public education differed greatly. While most northern states had systems of public education in place for elementary children by 1860, few, if any, southern states made systemic provisions for publicly educating elementary-age students.

The nineteenth century differences were cogently startling to an outside observer:

The North had begun to provide free public schooling in the thirties and forties. In this respect, as in so many others, the ante-bellum South had undoubtedly been backward... However, it should also be recorded that the state of Mississippi did not introduce public education for any race until 1919. (Brogan, p. 372, n. 11)

A native historian described the educational situation as it existed at the beginning of the Civil War:

Perhaps Horace Mann and the public school system had made ante-bellum Americans the most generally educated people on earth. A majority of children attended schools in the North; a few states and a number of cities in the poorer and more sparsely settled South supported good public

educational programs. The southern elite employed tutors, enrolled their children in some 3000 private academies... (Patrick, p. 234)

Following the end of the Civil War, “a marked contrast between northern and southern response[s] to peacetime educational needs” was noted (Patrick, p. 235). Not only did the Northerners resume spending “relatively ample funds freely on schools,” they also “financed missionary teachers in the South” (Patrick, p. 235). As a result, “[m]any ‘schoolmarms’ descended on the South to educate the children of a race held back by the lash, and to demonstrate Christian love to benighted white natives” (Patrick, p. 236). According to a noted historian’s analysis, “The best estimate is a maximum of five thousand Yankee schoolmarms in the South” (Woodward, 1960, 1968, p. 169). Not until after the passage of the congressional act in 1867 to reconstruct the South, however, did southern states move to address the issue of public education. Required by the Military Reconstruction Act to develop and submit new state constitutions for northern approval, a “southern public school system was established” (Patrick, p. 237).

Without exception constitution-makers operating under the aegis of Congressional Reconstruction inserted public school provisions in state constitutions. An educated citizenry was an essential ingredient of republican government, every child should have educational opportunity, and the taxpayer had a duty to provide schools. These were the noblest designs of southern [Reconstruction] regimes.... (Patrick, p. 236)

As a result of this educational initiative in the South, “[T]he number and percentage of white and Negro children enrolled and attending public schools steadily increased. The educational year lengthened to 100 or more days” (Patrick, p. 236). Of course, some states lagged behind others in their implementation of a system of public education; however, once implemented, the results were impressive. While South Carolina’s constitution of 1868 created a system of public education, the state’s legislature did not fund it until 1873, a date which is

credited for the introduction of “free public schools into the state for the first time” (Zinn, p. 148). From an educational perspective the results were impressive:

Not only were seventy thousand Negro children going to school by 1876 where none had gone before, but fifty thousand white children were going to school where only twenty thousand had attended in 1860. (Zinn, p. 148)

With the implementation of state-wide systems of public education throughout the South, “the rate of illiteracy gradually declined” (Patrick, p. 237). Literacy rates improved so that “by 1880, 86 per cent [sic] of white Texans over ten years of age could at least read and write, and 28 per cent of Tennessee’s Negroes were literate” (Patrick, p. 237).

The accomplishments achieved through establishing a system of public education, however, did not lessen the resentment over the fact that it occurred as a result of the defeat of the South and the ensuing military occupation by the North. Public education was widely regarded as a Yankee imposition upon the defeated South. The dominant southern attitude was that “free education was ‘imported here by a gang of carpetbaggers,’” according to one southern newspaper editor (Woodward, 1951, p. 61). After the Compromise of 1877 signaled the official end of Reconstruction, the actions of southern states constituted, in many respects, a reaction against the North. In one historian’s view, “Public education, bearing in many minds the stigma of a Carpetbag measure, was first to suffer” (Woodward, 1951, p. 61). The governor of Virginia publicly declared that public schools were “a luxury ... to be paid for like any other luxury, by the people who wish[ed] their benefits,” while a Richmond newspaper editor editorialized that taxation to support public education “was socialistic” (Woodward, 1951, p. 61). Nor were such negative views confined to Virginia.

Surveying the effects of the South’s reaction to Reconstruction in the aftermath of the Compromise of 1877, referred to by southerners as the Redemption of the South, Professor C.

Vann Woodward observed, “In Texas, Tennessee, Mississippi, Alabama, Louisiana, Arkansas, and Florida reaction crippled the schools, and throughout the South public education suffered” (Woodward, 1951, p. 61). As state funding was diverted from public education across the South, the “average length of the common school term” was reduced from a 100-day school year to an 80-day term of schooling (Woodward, 1951, pp. 61-62). State appropriations for public education in Virginia “declined from \$483,000 [in 1876, the last year of Reconstruction] to \$195,000 [in 1878, the second full year following the Compromise of 1877, or the second year of Redemption]” (Woodward, 1951, p. 93). In his report for 1878, the State School Superintendent of Virginia “doubted ‘that more than one-half as many schools will be opened’” the following year compared with the last school year (Woodward, 1951, p. 93). An examination of figures (compiled by the U.S. Census Bureau and compiled by geographic region of the country) comparing state expenditures for public education during Reconstruction compared with state support of public education after the Redemption further illustrate the southern reaction to public education as a Yankee imposition (See Table 5).<sup>100</sup>

*Table 5:  
Per Pupil Expenditures for Public Education*

	<u>1871</u>	<u>1880</u>
South Atlantic Region	\$ 10.27	\$ 6.60

Census figures for the South Central Region show a similar rate of decline in public school funding as measured per capita of population, from 81¢ in 1872 to 51¢ in 1877 (Woodward, 1951, p. 62).

The effects of the retreat from public education in the South were only too predictable. Literacy declined while illiteracy increased. A southern historian of the period cited an editorial in the New Orleans *Times-Democrat* in the August 3, 1890, edition to illustrate the impact:

Thirteen years after Redemption a Louisiana newspaper complained that “there is an illiterate majority to-day [sic], whereas there was none in 1880, that this illiteracy prevails not among the negroes alone, but among the whites as well.” These were but the “natural effects of a poor public school system...” (Woodward, 1951, p. 62)

Following the destruction of the public school system in Tennessee by the “Redeemers,” figures comparing the population increase to the illiteracy increase provide further illustration of the damage: “[W]hile the white population had increased only 13 per cent [sic] during the preceding ten years, white illiteracy had increased 50 per cent [sic]” (Woodward, 1951, p. 63). Combining paraphrase with quotation, Woodward used the views expressed by the Galveston *Daily News*, December 9, 1880, to portray the situation in Texas:

Retrenchment in Texas left the people with “scarcely a decent pretense” of an efficient public school system. “The sons and daughters of the poorer classes, except here and there in favored localities, are thus condemned ... to grow up in ignorance. (Woodward, 1951, p. 63)

The impact was long-lasting, even “after the pressure of the farmers’ movement had been felt” in 1890 and per capita expenditures for public education began increasing slightly throughout the South (Woodward, 1951, p. 62). It was not “until after 1900” that the average school term across the South reached its Reconstruction length of 100 days (Woodward, 1951, p. 62). Literacy, or rather illiteracy, figures portray the cleavage between the ex-Confederate states and the rest of the nation regarding support for public education (See Table 6 below).<sup>101</sup> Paralleling literacy figures is the data regarding compulsory school attendance by the states. “By 1900 all states outside the South, except two, had adopted some kind of compulsory school-attendance law, while Kentucky was the only one of the Southern states with such a law” (Woodward, 1951, p.

399). It would not be until 1918 that all states would have enacted compulsory school-attendance laws in this country (Hofstadter, p. 326).<sup>102</sup> Reflecting the lack of value attached to public education in the South, 1901 figures indicated that “less than half of the children of school age were regularly attending them [schools]” (Woodward, 1951, p. 399). More specifically:

The percentage of white children of school age in daily attendance in Southern states ranged from 37 in Virginia to 56 in Texas, with only three states having more than 50 per cent [sic]. Attendance among Negro children ranged from 23 per cent in Texas to 46 per cent in Tennessee, and in no state were so many as half of them regularly in school. (Woodward, 1951, pp. 399-400)

The southern states with the highest rates of illiteracy in 1900 were North Carolina (19.5%), Louisiana (17.3%), Alabama (14.8%), and Tennessee (14.2%) (Woodward, 1951, p. 400).

*Table 6:  
U.S. Illiteracy in 1900*

Southern States (Whites)	12.0 %
Southern States (Negroes)	50.0 %
North Atlantic States	1.6 %
United States	4.6 %

Perhaps because of slavery, and perhaps because of the lack of a sizeable middle class, the movement for public education that developed in the northern states during the 1830s and 1840s didn’t take hold in the South. For psychological reasons, public education was not supported by southern states following the Compromise of 1877, better known in the South as Redemption. Such attitudes had a significant impact lasting several generations. The intermediate impact, that still enduring at the opening of the twentieth century, was summarized by a twentieth-century historian with southern roots:

The public schools of the South at the opening of the new century were for the most part miserably supported, poorly attended, wretchedly taught, and

wholly inadequate for the education of the people. Far behind the rest of the country in nearly all respects, Southern education suffered from a greater lag than any other public institution in the region. (Woodward, 1951, p. 398)

***Sociological undercurrents – white racism & white supremacy v. equality.***

The country had been divided on the issue of slavery. The twenty northern states opposed slavery, the four border states had recognized slavery but had ratified the Thirteenth Amendment ending slavery, and the eleven southern states had withdrawn from the Union in order to preserve the institution of slavery.<sup>103</sup> At the same time, however, the country was fairly united in supporting white supremacy. Lincoln, himself, implied as much during his debate with Stephen Douglas at Charleston, Illinois, when he denied favoring either social or political equality for African-Americans (See previous pp. 741-742 of this document). Yet, Lincoln created some ambivalence on the topic with his references to the Declaration of Independence, asserting, as it were, a difference between socio-political rights and natural rights. At one point, Lincoln declared:

I, as well as Judge Douglas, am in favor of the race to which I belong having the [socially] superior position. I have never said anything to the contrary, but I hold that, notwithstanding all of this, there is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty, and the pursuit of happiness. I hold that he is as much entitled to these as the white man. (Wills, 1992, p. 100)

Earlier, Lincoln had used the founding document to argue that one could not believe in both the Declaration of Independence and the prejudice in favor of slavery. According to Lincoln:

I think the authors of that notable instrument [the Declaration of Independence] intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral development, or social capacity. They defined, with tolerable distinctness, in what respects they did consider all men equal – equal in “certain unalienable rights, among which are life, liberty, and the pursuit of happiness.” This they said, and this they meant. (Emphasis in original) (Wills, 1992, p. 100)

To further illustrate the complications arising from what appear to the Twenty-first Century reader to be illogical, if not contradictory, positions, while the North was united regarding opposition to slavery, only a small handful of states in the North favored African-American suffrage. Unlike Lincoln, most northerners were unable to see a distinction between socio-political equality and the equality derived from natural rights. Of the eighteen northern states in the Union at the time, only five states permitted “the Northern Negroes” to vote in 1860 on the eve of the Civil War: “Massachusetts, New Hampshire, Vermont, Maine, and Rhode Island” (Woodward, 1966, p. 20; also see Wiecek, p. 191; and Woodward, 1960, 1968, p. 83). Such views created an anomaly. While northern proponents of reconstructing the South wished to require southern states to give the vote to the newly freed slaves, such advocacy for the South did not mean that the same should occur in the North. The hypocrisy of this approach was noted by a historian specializing in the Fourteenth Amendment’s formulation and adoption when he observed, “Advocacy of Negro suffrage for the South did not necessarily indicate approval of such a policy for the North” (James, 1965, p. 15). The situation was even worse regarding the foundation of Anglo-Saxon law, the right to be tried by a jury of ones peers as opposed to royal or ecclesiastical figureheads:

By custom or by law Negroes were excluded from jury service throughout the North. Only in Massachusetts, and there not until 1855, were they admitted as jurors. Five Western states prohibited Negro testimony in cases where a white man was a party. (Woodward, 1966, p. 20)

As will be shown, on the issue of suffrage, the political needs of the northern Republicans to remain in power would trump the sociological views of white racism wishing to deny black people the vote – at least during the heyday of Reconstruction.



While most modern Americans associate the system known as Jim Crow with the southern states and with the racial segregation legalized by *Plessy v. Ferguson*, Jim Crow was actually a northern invention before it developed full blossom in the South. Professor Woodward first drew attention to this peculiarity in his seminal work, *The Strange Career of Jim Crow*. According to Woodward:

Segregation in complete and fully developed form did grow up contemporaneously with slavery but not in its midst. One of the strangest things about the career of Jim Crow was that the system was born in the North and reached an advanced age before moving South in force. (Woodward, 1966, p. 17)

Woodward discovered that the French observer of early American life, Alexis de Tocqueville, had been surprised “at the depth of racial bias he encountered in the North” (Woodward, 1966, p. 20). According to Tocqueville:

The prejudice of race appears to be stronger in the states that have abolished slavery than in those where it still exists; and nowhere is it so intolerant as in those states where servitude has never been known. (Woodward, 1966, p. 20)

Although slavery had been abolished in every northern state by 1830, a system of segregation “permeated all aspects of Negro life in the free states by 1860” (Woodward, 1966, p. 18).

Describing the system of Jim Crow in the North and why it developed as it did, Woodward observed:

[T]he Northern Negro was made painfully and constantly aware that he lived in a society dedicated to the doctrine of white supremacy and Negro inferiority. The major political parties ... vied with each other in their devotion to this doctrine.... Their constituencies firmly believed that the Negroes were incapable of being assimilated politically, socially, or physically into white society. They made sure in numerous ways that the Negro understood his ‘place’ and that he was severely confined to it. (Woodward, 1966, p. 18)

While Horace Greeley had advised young whites to “Go west,” such encouragement was not advisable for African-Americans, young or old. According to Professor Woodward’s analysis, “[T]he farther west the Negro went in the free states the harsher he found the proscription and segregation” (Woodward, 1966, p. 18). Woodward continued his explanation of this phenomenon:

Indiana, Illinois, and Oregon incorporated in their constitutions provisions restricting the admission of Negroes to their borders, and most states carved from the old Northwest Territory either barred Negroes in some degree or required that they post bond guaranteeing good behavior. (Woodward, 1966, pp. 19-20)

A British historian analyzed why African-Americans didn’t flood the North after gaining their freedom. One explanation he offered was racial discrimination. As he described it:

In fact one of the reasons why the North saw so few blacks was that they were not allowed to compete for good Northern jobs. They were excluded from the rising labour [sic] unions, and so from the factories, except as strike-breakers recruited by the factory owners, which of course did not increase their popularity. (Brogan, p. 374)

Throughout the North, “Negroes found themselves systematically separated from whites” (Woodward, 1966, p. 18).

[Northern Negroes] were either excluded from railway cars, omnibuses, stagecoaches, and steamboats or assigned to special “Jim Crow” sections; they sat, when permitted, in secluded and remote corners of theaters and lecture halls; they could not enter most hotels, restaurants, and resorts, except as servants; they prayed in “Negro pews” in the white churches, and if partaking of the sacrament of the Lord’s Supper, they waited until the whites had been served the bread and wine. (Woodward, 1966, pp. 18-19)

The results of ballot initiatives in the immediate aftermath of the war to end slavery bears out the prejudice of whites towards blacks.

In 1865 Wisconsin [and] Minnesota defeated proposals to allow the Negroes to vote, and the Nebraska constitution of 1866 confined suffrage to whites. New Jersey and Ohio in 1867 and Michigan and Pennsylvania in 1868 turned down proposals for Negro suffrage. (Woodward, 1960, 1968, p. 91)

The hypocrisy of these defeats was noted by an Iowa Republican following the rejection of election measures and after failed attempts at state conventions to extend the ballot to African-Americans in Iowa. As described by a historian specializing in the Fourteenth Amendment:

[I]n 1865 the Iowa election largely turned on the issue of the black vote for that state as the voters overwhelmingly repudiated extending the vote to blacks. As late as 1867 the lieutenant governor asked the Republican state convention, "How can you insist that loyal negroes shall vote in South Carolina, when you refuse to allow colored soldiers of your own Iowa colored regiment to vote here?" (James, 1984, p. 231)

Also in the fall of 1865, Connecticut voters rejected "the issue of Negro suffrage" (James, 1965, p. 16). To summarize, in the fall of the year following the conclusion of the Civil War, ballot initiatives to extend the franchise to black Americans failed in Connecticut, Iowa, Minnesota, and Wisconsin. Two years later white voters in New Jersey and Ohio refused to let free blacks vote in their states, and one year after this failure, white citizens voted to deny suffrage for African-Americans in Michigan and Pennsylvania. After five years of bloody conflict, and after three more years of arguments about reconstructing the South, there still remained only five states in which black people could vote, all of which were situated in New England where only 6% of "Northern Negroes lived," a figure meaning that 94% of "Northern Negroes" remained disenfranchised by white voters (Woodward, 1966, p. 20). This situation was not lost on astute contemporary observers of the American electorate:

[Regarding the issue of Negro suffrage] Secretary McCulloch flatly informed [Senator Charles] Sumner [of Massachusetts] that, in his opinion, if the Republican party went into an election on the suffrage issue, the opposition would win in three-fourths of the Northern states. (James, 1965, p. 15)

### **Emergence of the fourteenth amendment.**

With the adoption of the Thirteenth Amendment, the three-fifths compromise in the Constitution would be nullified. That paragraph would now read:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, ~~three-fifths of all other Persons~~.  
(U.S. Constitution, Article I, § 2, ¶ 3)

While the Thirteenth Amendment was not officially adopted by the states until later in 1865, its successful adoption was not doubted. However, its adoption would mean that once the defeated southern states were readmitted to the Union, the increased number of citizens (each of the former slaves now counted as one person instead of three-fifths of a person) would increase the number of southern Representatives in the House. Estimates revealed that “the South would be entitled to at least fifteen new representatives” (James, 1965, p. 22). Republican fears of what would then ensue were articulated by Senator Grimes of Iowa on September 14, 1865:

We all know that the Democratic party desire and intend to coalesce with the returned rebels from the South. By that means, if they can succeed in distracting the supporters of the Government and secure a few Northern States, they hope to obtain control of the government, and then will follow the assumption of the rebel debt, the restoration of slavery under a less odious name, and the return of leaders of the rebellion to power. (James, 1965, p. 26)

The practicality of how the increased representation from southern states was spelled out by the *Chicago Tribune* on August 5, 1865, and provided just cause for the alarm articulated by Senator Grimes. Professor James paraphrased the *Chicago Tribune*’s forecast:

Without [black] votes..., ex-rebels would immediately gain control of the government. The increased Southern delegation would need only twenty-nine cooperating Northern votes to dominate the House. Just where most of those needed votes were to be found the *Tribune* pointed out precisely: nine or ten in New York, five or six in Pennsylvania, at least three in New Jersey, three in Ohio, three in Illinois, and one in Wisconsin. (James, 1965, p. 22)

A reading of the Fourteenth Amendment as ratified by the states shows that these fears were eventually addressed by the text of that amendment (See Appendix S). However, prior to the development of the Fourteenth Amendment, Republicans pinned their hopes on suffrage for African-American adult males.

Of all the movements influencing the Fourteenth Amendment ..., that for Negro suffrage was the most outstanding.... The cry for a changed basis of representation was, in reality, subsidiary to this, and was meant by Radicals to secure in another way what Negro suffrage might accomplish for them: removal of the danger of Democratic dominance as a consequence of Southern restoration. The danger of possible repudiation of the national obligations, and assumption of the rebel debt, was invariable presented to show the need for Negro suffrage or a new basis of representation. Sentiment for disqualification of ex-Confederates, though a natural growth, well suited such purposes. (James, 1965, p. 33)

However, these hopes were dashed by northern voters in the state elections of 1865 when the question of African-American suffrage was soundly rejected in several states (James, 1965, pp. 33, 185, 189). Dealing with the political reality of the time, Republicans eventually adjusted during the opening months of the first session of the Thirty-ninth Congress in December, 1865. As described by Professor James, “The movement to guarantee civil rights, sponsored originally by the more conservative Republicans, received emphasis from Radicals only when state elections indicated that suffrage would not serve as a party platform” (James, 1965, p. 33). Divided on the question of voting rights for black citizens, Republicans in the Thirty-ninth Congress united to pass the Civil Rights Act of 1866 over the veto of President Johnson and approved the Fourteenth Amendment that was subsequently submitted to the states for ratification and eventual adoption.

The Fourteenth Amendment first originated in the Joint Committee on Reconstruction and formed a part of that committee’s plan for reconstructing the rebellious southern states. The Guarantee Clause provided the justification for the Reconstruction program that eventually

emerged, of which the Fourteenth Amendment formed an integral part. Articulated in a resolution proposed by Representative John Broomall of Pennsylvania that was subsequently adopted, the resolution stated:

That whenever the people of any state are thus deprived of all civil government [by rebellion] [sic], it becomes the duty of Congress, by appropriate legislation, to enable them to organize a state government, and in the language of the Constitution, to guarantee to such state a republican form of government. (Wiecek, p. 199)

What eventually became the Fourteenth Amendment was first developed by an Indiana reformer, Robert Dale Owen, who acted “as a kind of liaison between certain congressmen and several reform groups” (James, 1965, p. 56). Having previously shown his proposal to Governor Morton of Indiana and several other friends, Owen then visited Representative Thaddeus Stevens of Pennsylvania and read it to him “aloud” (James, 1965, p. 100). Owens then suggested that it be shown individually to members of the Reconstruction Committee before it was officially introduced to the Joint Committee on Reconstruction, a proposal to which Stevens agreed. Following this, Congressman Stevens subsequently introduced Owen’s proposed amendment to the Joint Committee on April 21, 1866 (James, 1965, p. 103). Owen’s proposal read:

Section 1. No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons, because of race, color, or previous condition of servitude.

Section 2. From and after the fourth day of July, eighteen hundred and seventy-six, no discrimination shall be made in any State nor by the United States, as to the enjoyment, by classes of persons, of the right of suffrage, because of race, color, or previous condition of servitude.

Section 3. Until the fourth day of July, eighteen hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage, discrimination shall be made by any State, because of race, color, or previous condition of servitude, shall be included in the basis of representation.

Section 4. Debts incurred in aid of insurrection, or of war against the Union, and claims of compensation for loss of involuntary service or labor, shall not be paid by any State nor by the United States.

Section 5. Congress shall have power to enforce, by appropriate legislation, the provisions of this article. (James, 1965, p. 100)

Representative John Bingham of Ohio then moved to amend the first section of Owen's proposal by adding the phrase "... nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation" (James, 1965, p. 103). With three members absent, Bingham's amendment failed 5-7 (James, 1965, p. 103). Following further discussion and votes on other amendments to Owen's proposal, Representative Bingham proposed to insert the following proposal in the fifth section:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (James, 1965, p. 104)

Adopted 10-2 by the Joint Committee on Reconstruction, Bingham later explained the origin of his amendment – his reading of Chief Justice Marshall's opinion in *Barron v. Baltimore* (James, 1965, p. 104). Some five years later, the Representative from Ohio explained:

I had read – and that is what induced me to attempt to impose by constitutional amendments new limitations upon the power of the States – the great decision of Marshall in *Barron vs. the Mayor and City Council of Baltimore*, wherein the chief justice [sic] said, in obedience to his official oath and the constitution [sic] as it then was: "The amendments contain no expression indicating an intention to apply them to the State governments. This court [sic] cannot so apply them." (James, 1965, p. 104)

Professor James provided additional information into Representative Bingham's thinking:

On further examination of Marshall's opinion in the *Barron* case, Bingham said that he had particularly noticed the following reference to the first eight amendments: "Had the framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the framers of the original constitution and have expressed that intention." "Acting upon this suggestion," continued Bingham, "I did imitate the framers of the original Constitution. As they had said 'no State

shall..., imitating their example and imitating it to the letter, I prepared the provision of the first section of the fourteenth amendment [sic] as it stands in the constitution [sic].” (James, 1965, p. 105)

This is how the matter stood on Saturday, April 21, 1866, when the Joint Committee on Reconstruction adjourned (James, 1965, p. 107).

Following more discussion and more changes to Owen’s original proposal, the Joint Committee voted on Saturday, April 28, 1866, “to report the amendment” to both houses of Congress on Monday, April 30th (James, 1965, p. 115). A copy of the proposed amendment was released to the press, “which appeared in the leading newspapers the next day (Sunday, April 29)” (James, 1965, p. 115). What appeared follows:

Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of male citizens shall bear to the whole number of such male citizens not less than twenty-one years of age.

Section 3. Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice-President of the United States.

Section 4. Neither the united States nor any State shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for the loss of involuntary service or labor.

Section 5. The Congress shall have power to enforce by appropriate legislation the provisions of this article. (James, 1965, pp. 115-116)



After much debate and analysis, the House of Representatives voted 128-37 on May 9, 1866, to approve the amendment submitted on April 30th to the full legislative chamber by the Joint Committee on Reconstruction (James, 1965, p. 131). Reporting the event in his diary, Lester Ward declared, “The most important political event of the week is the passage by the House of Representatives of the Constitutional Amendment offered by the Reconstruction Committee” (James, 1965, p. 131).

Senator Howard of Michigan introduced the proposed amendment on Wednesday, May 23, 1866. In introducing the proposal from the Joint Committee, Howard reviewed the extensive hearings conducted by the Joint Committee prior to beginning work on the amendment, characterizing the work as an “attempt to arrive at the facts by hearing and digesting an enormous amount of testimony” (James, 1965, p. 135). Professor James paraphrased Senator Howard’s description of the Joint Committee’s findings:

The evidence, said Howard, indicated the necessity of a constitutional amendment to restore peace, to invigorate the laws, and to give security against the recurrence of evil times from which the nation was only then emerging. The proposal before the Senate had been framed to achieve these ends. (James, 1965, p. 136)

Following Senator Howard’s presentation, numerous amendments were offered, but no action was reported. Senate Republicans subsequently began meeting in caucus to discuss changes to the House proposal. At the fourth caucus on Monday afternoon of May 28th, “the five Republican senators on the Joint Committee were appointed to put into writing the views of the caucus” (James, 1965, p. 141). On the following morning, Senator Fessenden presented the committee’s work to the caucus. Professor James reported, “In less than an hour, it was adopted with only minor alterations” (James, 1965, p. 141).

That same day, May 29, 1866, Senator Howard reported to the full Senate the changes made to the House proposal by the Republican caucus. Debate raged for several days. On May 30th, Senator James Doolittle of Wisconsin, a Republican who had not attended the caucus meetings of the Senate Republicans, proposed the addition of the phrase “excluding Indians not taxed” to the section dealing with the apportionment of Representatives for each state (James, 1965, p. 143). Professor James described the ensuing discussion:

On the meaning and merits of this phrase, Howard, Trumbull, and Johnson entered into a long legal discussion. Western senators were especially interested in the possible practical effects of any such language on the Indians within their boundaries or in the territories. Apostles of racial equality for the black man were sometimes not so sure about the red. Race relations had a long history in the United States, and to question inferiority of either non-white race was still a new idea to most people. (James, 1965, p. 143)

On Friday, June 8, 1866, the Senate voted on the version developed in the Senate Republican caucus as amended by Senator Doolittle’s proposed insertion. This version became the Fourteenth Amendment (See Appendix S for specific language). With five senators not voting, the proposed amendment passed by the two-thirds margin required. The final tally was 33-11 (James, 1965, p. 149). If one considers that twenty-two senators from the eleven seceded southern states did not participate, the victory is all the more remarkable, particularly given the mid-twentieth century legal applications made according to the terms of the Fourteenth Amendment. Voting on the Senate’s version, the House of Representatives voted overwhelmingly to approve, 120-32 (James, 1965, p. 151).

Within a year of being submitted to the state legislatures for ratification, twenty of the twenty-one Union states had ratified, the single exemption being California which refused to take any action (See Appendix T). All four border states rejected the Fourteenth Amendment along with ten of the eleven seceded southern states – Tennessee, being the exception, ratified the

Amendment slightly more than a month after both the Senate and House votes approved it (See Appendix T). The Fourteenth Amendment was officially declared to be ratified by Secretary of State William H. Seward on July 21, 1868 (James, 1984, p. 298).

The impact of the Fourteenth Amendment upon the 1866 elections “proved the strength of Radicals in 1866” (James, 1965, p. 178). The overwhelming popularity of the Fourteenth Amendment in the North as reflected in both the 1866 election results and the successful ratification campaign, in conjunction with the overwhelming rejection of the Fourteenth Amendment by the seceded Southern states, combined to force a tougher federal policy towards the South. Professor James summarized the events:

After provisional governments of the Southern states established under executive authority [by President Johnson] had rejected the Fourteenth Amendment, though they had recently approved the Thirteenth, they were replaced by governments under military control established by authority of congressional statutes. These governments, which were not privileged to participate in ordinary federal legislation, finally succumbed to pressure and ratified the proposed amendment to the most fundamental law of the land. (James, 1965, p. 192)

What eventually became the Equal Protection Clause of the Fourteenth Amendment was initially urged by William Goodell, described as “an amazingly prolific author, pamphleteer, and editor” (Wiecek, p. 160). Goodell, however, connected the equal protection of the laws to the Guarantee Clause. Arguing in 1845 that the bills of rights in the various state constitutions and the Declaration of Independence “make the very pith and essence of a republican government to consist in the protection and security of those rights” (Wiecek, p. 161). As a result, he viewed the Guarantee Clause of the Constitution as “a positive command to the states to protect the freedoms and civil liberties of their people” (Wiecek, p. 161). Originally a part of the Free Soil movement, in 1847 Goodell declared the Southern system of slavery to be “illegal and unconstitutional, and that the federal government [was] bound to secure its abolition by the

guaranty [sic], to every state in this Union, of a republican form of government” (Wiecek, p. 162). Rejected by the Free Soil movement regarding the abolition of slavery, Goodell and his group formed the “Liberty Party Abolitionists” (Wiecek, p. 162). Changing their name in 1860 to the Free Constitutionalists, “[t]heir 1860 platform strikingly anticipated the later Radical Republicans’ citizenship/due process/equal protection/ privileges-and-immunities approach embodied in the Fourteenth Amendment” (Wiecek, p. 163). Dr. Wiecek, then Associate Professor of History at the University of Missouri, continued:

Citing the guarantee clause as a means of asserting federal supremacy over the states, they [the Free Constitutionalists] argued that a republican form of government implies something more than merely representative government; it requires that “at least all the members of the republic shall enjoy the protection of the laws,” so that the federal government is obliged to see to it that each state extends to all its citizens, including the enslaved blacks, the protection of law. (Wiecek, pp. 163-164)

Commenting on the situation presented by the Free Constitutionalists, Professor Wiecek observed, “[T]he theorists who placed their chief hopes on the guarantee clause as a way of destroying slavery in the states were complete failures” (Wiecek, pp. 164-165). Continuing, he noted the irony presented by Goodell and the Free Constitutionalists, the Civil War, and Reconstruction:

Yet after slavery was destroyed by other means – under the war powers of the commander in chief and by constitutional amendment – the Goodell sect’s arguments were repeated and echoed by the Republicans they excoriated in the fifties as the constitutional justification for Radical Reconstruction. (Wiecek, p. 165)

### **Case Law of the Fourteenth Amendment**

**The equal protection clause: Foundational & regarding education as a fundamental right.**

***Civil Rights Cases, 109 U.S. 3 (1883).***

*Facts & procedural history.*

The nomenclature, *Civil Rights Cases*, actually refers to five singular cases that were grouped by the 1883 Supreme Court because of their common subject matter, that being the Civil Rights Act of 1875, which was titled “An Act to protect all citizens in their civil and legal rights” (p. 4). The major thrust of the Civil Rights Act of 1875 was to outlaw racial discrimination by owners/operators of public conveyances and accommodations throughout the country, or as the attorneys and both the majority and dissenting opinions of the Court referred to them, “inns, public conveyances, and theatres” (pp. 9-10). Section one of the 1875 Civil Rights Act articulated what was to be achieved by the act:

That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude. (p. 9)

Section two of the Civil Rights Act of 1875 specified the penalties for anyone violating the act, penalties that included indemnifying the person denied the equal protection of the law as well as paying an additional fine or serving time in jail. According to Section two:

That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offence [sic] forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence [sic], be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year. (p. 9)

Of the five cases, two dealt with denial of access to theaters (by Ryan in San Francisco and by Singleton in New York City), two dealt with denial of accommodations (by Stanley in

Kansas and by Nichols in Missouri), and one sought to recover damages under Section two of the Civil Rights Act of 1875 for being denied use of the ladies car on a train (by officials of the Memphis and Charleston Railroad Company in Tennessee). Four of the lawsuits were brought by federal officials against the racist defendants while in the fifth lawsuit, the victims brought action against the railroad to recover damages under the law for being denied the equal protection of the law by railway company officials.

Because of the variance in locations whereby public officials violated the provisions of the Civil Rights Act of 1875 by denying individuals the equal protection of the law, the five individual cases reached the Supreme Court through differing federal circuit courts for somewhat different reasons. Two of the cases gained a hearing before the Court by means of a Writ of Error while three of the lawsuits arrived before the Court as a result of a Certificate of Division because the circuit justices could not reach agreement on the constitutionality of the matter before the circuit bench. Regarding the subject matter of denial of public theater accommodations, *United States v. Ryan* reached the Court on a Writ of Error to the Circuit Court for the District of California while *United States v. Singleton* appeared before the Court on a Certificate of Division from the Circuit Court for the Southern District of New York. Regarding the subject matter of denial of lodging accommodations, *United States v. Stanley* arrived before the Court on a Certificate of Division from the Circuit Court for the District of Kansas while *United States v. Nichols* reached the Court on a Certificate of Division from the Circuit Court for the Western District of Missouri. Finally, *Robinson & Wife v. Memphis and Charleston Railroad Company* arrived before the Court by means of a Writ of Error to the Circuit Court for the Western District of Tennessee. All five cases were uniform in that both plaintiffs and

defendants agreed that denial of use of public transportation, of lodging accommodations, and of theater access occurred by reason of race.

*Legal questions.*

First, do the first and second sections of the Civil Rights Act of 1875 fall within the constitutional protections of the Thirteenth Amendment? Second, are the first and second sections of the Civil Rights Act of 1875 constitutionally authorized by the Fourteenth Amendment? Third, are the equal accommodations in inns, public conveyances and places of public amusement “rights that are constitutionally demandable” (p. 4)?

*Legal reasoning of opposing parties.*

The legal reasoning of defendants in the *Civil Rights Cases* was not presented in the official report of the case. According to the Court’s report, no attorneys appeared before the Court to represent four of the five defendants, and no briefs were filed by attorneys for the defendants in four of the five individual cases grouped together under the heading of *Civil Rights Cases*. An attorney did appear before the Court on behalf of the defendants in error, the Memphis and Charleston Railroad Company; however, his legal arguments were not presented in the official record of the Court.

It may be assumed that the four unrepresented defendants relied upon: a) the social and political realities of the period in which the events occurred; and/or b) the arguments presented by defense attorneys for the railroad; and/or c) the discussions recorded by the various circuit courts forwarded to the High Court as a result of the two forms of writs issued. Although not officially reported by the Court, defendants’ legal arguments may be deduced from the majority Court’s ruling which acted to exonerate all of the defendants in the five separate cases. Owing to this situation, detailed discussion of the defendants’ legal reasoning will be reserved for the

section in which the Court's rationale is presented for the majority opinion. Briefly, however, it can safely be stated that defendants argued that the Civil Rights Act of 1875 was unconstitutional as it overstepped the provisions of both the Thirteenth and Fourteenth Amendments.

The legal reasoning of plaintiffs in the *Civil Rights Cases* was presented by the Solicitor General of the United States and by an attorney representing Mr. and Mrs. Robinson. The Solicitor General reviewed seventeen previous decisions of the Court bearing upon the Thirteenth and Fourteenth Amendments. Those decisions ruled that the Thirteenth Amendment prohibited all forms of involuntary personal servitude. The Thirteenth Amendment viewed in conjunction with both the Fourteenth and Fifteenth Amendments were to be interpreted "as *advancing* constitutional rights previously existing" (Emphasis in original) (p. 6). The restraints of the Fourteenth Amendment upon state actions to deny due process and equal protection of the laws to individuals included all state executive, legislative, and judicial agencies. Therefore the Fourteenth Amendment justified congressional action designed to punish violations of the rights secured by the Fourteenth Amendment. The Solicitor General concluded by identifying the "right of locomotion" as a basic "element of personal liberty" first protected by English common law and subsequently by American case law arising after the adoption of the Constitution (p. 6). The Solicitor General next tied denial of that right to the system of slavery existing in America prior to the adoption of the Thirteenth Amendment. According to the Solicitor General:

Restraint upon the right of locomotion was a well-known feature of the slavery abolished by the Thirteenth Amendment. A first requisite of the right to appropriate the use of another man was to become the master of his natural power of motion, and, by a mayhem therein of the common law to require the whole community to be on the alert to restrain that power. (pp. 6-7)

All of the cases in the *Civil Rights Cases* interfered unlawfully with the right to locomotion. In doing so, they were not acting as private individuals but were acting in an arena "devoted to a



public use” (p. 6). Acting in such a field of public interest made it a “State interest” (p. 6). As such, the activities were prohibited by both the Thirteenth and Fourteenth Amendments.

Legal counsel for the Robinsons cited the Court’s own case law in support of the following principle: “Where the Constitution guarantees a right, Congress is empowered to pass the legislation appropriate to give effect to that right” (p. 7). The Civil Rights Act of 1875 was passed to give effect to the rights guaranteed by the Fourteenth Amendment and as such “was within the principles just announced” (p. 8). Finally, the attorney for Mr. and Mrs. Robinson cited the following from *Munn v. Illinois*, 94 U.S. 113, regarding the public good and its intersection with private property whereby it becomes a public or state interest:

Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property.

It has, in the exercise of these powers, been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc.

When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use. (p. 8)

According to the existing precedents contained within the Court’s case law, none of the defendants were acting in a private capacity since the nature of their business made it a public, i.e., state, interest and thus bound by the Thirteenth and Fourteenth Amendments to the Constitution.

#### *Holding & disposition.*

Justice Bradley delivered the Court’s majority opinion. Focusing on the constitutionality of the Civil Rights Act of 1875, the Court majority held that neither the Thirteenth Amendment

or the Fourteenth Amendment provided constitutional authorization for the congressional enactment of the first and second sections of the Civil Rights Act of 1875. Since the amended Constitution provided no authority for congressional action, sections one and two of the Civil Rights Act of 1875 were declared to be unconstitutional by the Court majority. As a result the indictments of all defendants involved in the five consolidated cases comprising the *Civil Rights Cases* were voided.

*Court's rationale.*

Justice Bradley's majority opinion first addressed the Fourteenth Amendment claims supporting the Civil Rights Act of 1875 and acknowledged that the

views and arguments of distinguished Senators, advanced whilst the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power [to pass the 1875 Civil Rights Act]. (p. 10)

The Court's majority did not, however, address the views and arguments of congressional legislators who first legislated what subsequently became the Fourteenth Amendment. Ignoring the intentions of legislators who developed the Fourteenth Amendment and further dismissing the thoughts of legislators who enacted the Civil Rights Act of 1875, the Court's majority opinion observed, "But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have" (p. 10). Neither did the Court majority address the case law presented by the U.S. Solicitor General, some seventeen (17) U.S. Supreme Court cases. Nor did the Court address the points of law presented by the Solicitor General regarding the Court's case law. In addition, neither did the Court address the case law, firmly anchored in the English common law, regarding the elemental right of locomotion for free people. Nor did the Court address the case law precedents put forth by the attorney for the Robinsons, most notably the Court's exposition of the legal proposition in *Prigg*

*v. Commonwealth of Pennsylvania* that Congress may enact legislation “for the protection of rights guaranteed by the Constitution” (p. 29). Neither, finally, did the Court majority address the issue raised by the Solicitor General regarding the public nature of private businesses engaged in transportation, lodging, and amusement. Had the Court addressed any of the legal items just cited or followed its own procedures in addressing the legislative intent of constitutional enactments and amendments as well as judicial precedents, the Court would have been forced to a different conclusion from what it, in actuality, did reach.

Noting that the Court majority ignored its own procedures and precedents, the question is raised, “How then did the Court proceed?” By using blinders that allowed it to ignore the aforementioned procedures, precedents, and points of law raised by attorneys appearing before the highest bench in the land, the Court majority devised a narrow interpretation of the Fourteenth Amendment in such a way that the opinion “largely mandated the withdrawal of the federal government from civil rights enforcement,” an action that “would not be reversed until after World War II” (Hall, 1992, p. 149). One legal scholar summarized the full impact of the Court majority’s decision in the *Civil Rights Cases*:

[T]he *Civil Rights Cases* fashioned a Fourteenth Amendment jurisprudence considerably less protective of individual rights than many of its framers had envisioned. The extent to which the Court’s narrow reading of Fourteenth Amendment protections helped usher in and foster the era of extensive segregation in southern and other states is open to debate. (Hall, 1992, p. 149)

A noted historian specializing in the period of American history during which the *Civil Rights Cases* was situated offered a less sanguine judgment about the subsequent impact of that decision upon the resulting development of segregation as bolstered by Jim Crow laws. Noting that the North and the South were never “very far apart on race policy,” and commenting on the political process of reconciliation between the two sections as a “cumulative weakening of resistance to

racism” on the part of northerners, C. Vann Woodward, Professor of History at Yale University, drew attention to the increased articles in the northern press centered on “white supremacy” and noted its significance for the rights of black people:

Such expressions [of white supremacy] doubtless did much to add to the reconciliation of North and South, but they did so at the expense of the Negro. Just as the Negro gained his emancipation and new rights through a falling out between white men, he now stood to lose his rights through the reconciliation of white men. (Woodward, 1966, p. 70)

Professor Woodward then discussed the nexus of such events to the Court by specifically referencing the *Civil Rights Cases* as a major point situated on a continuum beginning with the *Slaughter House Cases* (1873) and culminating in *Plessy v. Ferguson* (1896):

The cumulative weakening of resistance to racism was expressed also in a succession of decisions by the United States Supreme Court between 1873 and 1898 that require no review here. In the *Slaughter House Cases* of 1873..., the court drastically curtailed the privileges and immunities recognized as being under federal protection. It continued the trend in its decision on the *Civil Rights Cases* of 1883 by virtually nullifying the restrictive parts of the Civil Rights Act. (Woodward, 1966, pp. 70-71)

Specifically describing the Court’s holding in the *Civil Rights Cases*, Vann Woodward commented:

[T]he court held that the Fourteenth Amendment gave Congress power to restrain states but not individuals from acts of racial discrimination and segregation. The court, like the [northern] liberals, was engaged in a bit of reconciliation – reconciliation between federal and state jurisdiction, as well as between North and South, reconciliation also achieved at the Negro’s expense. (Woodward, 1966, p. 71)

In the *Civil Rights Cases* the narrow interpretation of the Fourteenth Amendment was fashioned by first quoting the first section of the Fourteenth Amendment, after which Justice Bradley’s majority opinion opined:

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.... It nullifies and makes void all State legislation, and State action of every

kind, which impairs the privileges and immunities of citizens of the United States... (p. 11)

Justice Bradley's majority opinion then proceeded to mischaracterize the Civil Rights Act of 1875 as a type of municipal code in the following manner:

It [the Fourteenth Amendment] does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws... (p. 11)

Furthermore, according to the Court majority, until such state laws were enacted, which are "adverse to the rights of citizens," congressional action cannot "be called into activity" (p. 13).

And once again, the Court majority took advantage of the opportunity to mischaracterize the Civil Rights Act of 1875 as a type of municipal code that is not authorized by the Constitution:

Such legislation [that arising from the authority of the Fourteenth Amendment] cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. (p. 13)

What if the Court should allow such legislation as the Civil Rights Act of 1875 to remain part of the body of the nation's laws? Using the slippery slope propaganda technique to create a straw man (See Appendix M), Justice Bradley's majority opinion addressed just such a possibility:

If this legislation [the Civil Rights Act of 1875] for enforcing the prohibitions of the amendment [the Fourteenth Amendment], it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? (p. 14)

And, having created the straw man, the Court majority then struck him down with yet another constitutional argument based on the Tenth Amendment. In the process, the Court majority

created a false premise in discussing the theoretical assumption upon which they claimed the Civil Rights Act of 1875 was based. According to the Justice Bradley's majority opinion:

The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject... The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people. (pp. 14-15)

Forced to deal with the fact that the Court had recently declared section four of the 1875 Civil Rights Act to be constitutional (a case heard by the Court of which Bradley was a member, but a case heard *before* Justice Bradley played the leading, and deciding, role in the infamous Compromise of 1877<sup>104</sup>), Justice Bradley's majority opinion spent the next five pages of the opinion attempting to differentiate between "corrective legislation" (acceptable to the Court) and laws that "regulate" (not acceptable unless covering a subject specifically mentioned in Article I, Section 8 of the U.S. Constitution, whereupon Congress has "direct and plenary powers of legislation over the whole subject").<sup>105</sup> In the process, Justice Bradley's majority opinion drew an incorrect analogy between the Civil Rights Act of 1875 and contract law, a maneuver that was pointed out in Justice Harlan's dissenting opinion discussed in the next section of this case.

Regarding the Thirteenth Amendment, Justice Bradley's majority opinion sought to create two classes of rights by interpreting Congressional intent in passing the Civil Rights Act of 1866 enacted subsequent to the Thirteenth Amendment, but prior to the Fourteenth Amendment. According to Justice Bradley and the Court majority:

Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or

deprivation of which constitutes the essential distinction between freedom and slavery. (p. 22)

Referencing its previous distinction between corrective and regulatory legislation at the federal level, the Court's majority opinion proceeded to use that distinction to differentiate the Thirteenth and Fourteenth Amendments. According to the majority opinion, "The amendments are different, and the powers of Congress under them are different" (p. 23). Justice Bradley explained the Court majority's reasoning:

Under the Thirteenth Amendment, the legislation ... may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings. (p. 23)

Having separated what had not been separate in the minds of the framers of the two constitutional amendments, Justice Bradley's majority opinion stated what it viewed as the critical question:

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? (p. 23)

One page later, the Court's majority opinion rephrased the question to emphasize its distinction between the actions of individuals and those of the State:

Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those [state] laws until the contrary appears? (p. 24)

Having crafted the question that it wanted to answer, the Court's majority answered by declaring that "such an act of refusal has nothing to do with slavery or involuntary servitude" (p. 24).

Furthermore, if any rights have been violated by such refusal, the injured party's "redress is to be sought under the laws of the State" (p. 24). In a fashion similar to that of a parent whose patience has been tried by repeated, troublesome queries from a child, a parent whose good intentions have been tried beyond measure, Justice Bradley's Court majority opinion remonstrated:

It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. (pp. 24-25)

Resentful of what it incorrectly viewed as an attempt to continue receiving special favor and status, the Court's majority opinion continued in the exasperated vein of telling an older child to grow up and take responsibility for one's own life:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. (p. 25)

Having found, after its own manner and fashion, that neither the Thirteenth nor the Fourteenth Amendments provided authority for congressional enactment of sections one and two of the Civil Rights Act of 1875, Justice Bradley's majority Court opinion declared them to be "unconstitutional and void" (p. 26). As a result the lower court judgments were ordered to be rendered "accordingly" (p. 26).

*Dissenting opinion.*

Justice John Marshall Harlan wrote a vigorous dissent that presaged twentieth century legal developments both prior and subsequent to *Brown v Board of Education* (See Appendix O for developments prior to *Brown*). Comparing the majority and dissenting opinions in Gestalt



terminology, figure for the Court majority consisted of current attitudes of most whites towards black people while figure for Justice Harlan consisted of the law applied in a race-blind manner without regard to the existing racial views of the majority of the dominant white population. While the Court majority ignored established legal principles governing the constitutionality of congressional action, Justice Harlan's dissent fully addressed the issues of intent, both with regards to the Thirteenth and Fourteenth Amendments and with regards to congressional intent in enacting the Civil Rights Act of 1875. While the Court majority ignored existing case law relating to judicial determinations of the constitutionality of legislation, particularly that emanating from *Prigg v. Commonwealth of Pennsylvania*, Justice Harlan fully addressed such case law. While the Court majority ignored the existing case law pertaining to the state interest attached to the public use of private property, Justice Harlan's dissent directed full attention to the issue. While the Court majority ignored the common law emanating from the English experience and confirmed in American case law regarding locomotion as an elemental right, Justice Harlan's dissenting opinion did not ignore such precedential development. While the Court majority ignored existing legal precedents bearing on legal points raised by attorneys, particularly as they pertained to the subject matters of citizenship and rights, Justice Harlan's dissenting opinion firmly grounded itself in the existing case law. Finally, Justice Harlan's dissent offered cogent criticism of the majority Court's reasoning.

Such is a qualitative and analytical comparison of the two opinions. A quantitative comparison would note that the opinion by the Court majority occupied only seventeen (17) pages of inventive legal reasoning that gave short shrift to normal Court procedures and reasoning, not to mention ignoring huge chunks of case law pertaining to the matter under judicial consideration, while Justice Harlan's dissenting opinion, which gave full attention to

established Court procedures and reasoning, which directly addressed existing case law, and which would require more space by virtue of addressing the legal issues involved and by virtue of following established procedures ignored by the Court majority, Justice Harlan's dissenting opinion required thirty-seven (37) pages.

Describing the majority opinion as proceeding upon "artificial grounds," Justice Harlan began his dissent by summarizing the results of the Court's majority opinion and then put into quotation marks a summary of the approach not used by the Court majority.

I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. "It is not the words of the law but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul. (p. 26)

Fleshing out his point, Justice Harlan continued:

Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish ... and which they supposed they had accomplished by changes in their fundamental law. (p. 26)

In order to defeat the intent of the Thirteenth and Fourteenth Amendments, Justice Harlan pointed out, the Court majority had "departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted" (p. 26). Justice Harlan would come back to that point in the later part of his dissenting opinion.

Nor was that the only omission by the Court majority. The next omission was where he and the Court majority parted company. Justice Harlan began that discussion by noting that both he and the other justices were agreed upon one thing, namely, the intent of the Civil Rights Act of 1875. According to Justice Harlan:

There seems to be no substantial difference between my brethren and myself as to the purpose of Congress; for, they say that the essence of the law is ... that colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white persons; and *vice versa*. (Emphasis in original) (p. 27)

Observing that the Court majority had adjudged “erroneously that Congress is without power, under either the Thirteenth or Fourteenth Amendment, to establish such regulations, and that the first and second sections of the statute are, in all their parts, unconstitutional and void,” Justice Harlan proceeded to cite the Court’s own procedures established in its own precedential case law for arriving at judicial determinations of the constitutionality of congressional enactments.

Citing *Fletcher v. Peck* and *Sinking Fund Cases*, Justice Harlan quoted legal principles bearing on determining constitutionality that such a determination should never be made except “in a clear case” where the “opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other” (p. 27).

Through ignoring its own procedures, Harlan implied, the Court majority thus traveled down an improper path and arrived at an erroneous decision.

Perhaps the irony was lost on the Court majority, but the modern-day reader can’t help but note its presence in Justice Harlan’s next treatment, a two-part treatment that again confronted that which had been ignored by the Court majority. The subject matter of the first part, *Prigg v. Commonwealth of Pennsylvania* (1842), was the Fugitive Slave Law of 1793, a law that had been passed to enforce Article IV, § 2, of the Constitution. Article IV, § 2 states:

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Upholding the constitutionality of the Fugitive Slave Law of 1793, the Court articulated the following basic legal principles:

That a clause of the Constitution conferring a right should not be so construed as to make it shadowy, or unsubstantial ... when another construction equally accordant with the words and the sense in which they were used, would enforce and protect the right granted.

That Congress is not restricted to legislation for the execution of its expressly granted powers; but, for the protection of rights guaranteed by the Constitution, may employ such means, not prohibited, as are necessary and proper, or such as are appropriate to attain the ends proposed.

The fundamental principle, applicable to all cases of this sort, would seem to be that when the end is required the means are given. (pp. 28-29)

And, finally, the Court in *Prigg v. Commonwealth of Pennsylvania*, concluded:

It would be a strange anomaly and forced construction to suppose that the national government meant to rely for the due fulfillment [sic] of its own proper duties, and the rights which it intended to secure, upon State legislation, and not upon that of the Union. (p. 29)

The preceding legal principles, forming the bedrock of constitutional interpretation, were followed by the Court in upholding the constitutionality of the 1793 Fugitive Slave Law.

The second part of Justice Harlan's two-part treatment of *Prigg v. Commonwealth of Pennsylvania* focused on the successor to the Fugitive Slave Law of 1793, the Fugitive Slave Law of 1850 whose constitutionality came before the Court in *Ableman v. Booth* (1859) immediately prior to the outbreak of the Civil War. Justice Harlan drew attention to the fact that this act went far beyond its predecessor in enforcing the rights of the slave owner. Just how the new law went beyond the former law was first summarized and then explained by Justice Harlan. According to Justice Harlan, "They [the provisions of the 1850 act] placed at the disposal of the master seeking to recover his fugitive slave, substantially the whole power of the nation" (p. 30).

Justice Harlan substantiated his summary by noting just how the entire power of the nation was used to help the slave owner by the Fugitive Slave Act of 1850:

It invested commissioners, appointed under the act, with power to summon the *posse comitatus* for the enforcement of its provisions, and commanded all good citizens to assist in its prompt and efficient execution whenever their services were required as part of the *posse comitatus*. (p. 30)

As Justice Harlan noted, the constitutionality of the Fugitive Slave Law of 1850 rested “solely upon the implied power of Congress to enforce the master’s rights” (p. 30).

The irony, surely noted by the thoughtful reader, lies in the Court’s disparate treatments regarding the two fugitive slave laws on the one hand and the 1875 Civil Rights Act on the other hand. In upholding the rights of the slave master, the Court followed fully its own legal principles as articulated in case law regarding constitutional interpretation. In disallowing the rights of the newly freed slaves, the Court ignored its own legal principles governing constitutional interpretation. Had the Court used the same procedures in the *Civil Rights Cases* as it used in the two fugitive slave law cases, the constitutionality of the Civil Rights Act of 1875 would have been affirmed. Alternatively, had the Court used the same procedures in the two fugitive slave law cases as it used in the *Civil Rights Cases*, the two fugitive slave laws would have been voided and declared to be unconstitutional.

In examining the Thirteenth Amendment as a justification or not for the Civil Rights Act of 1875, Justice Harlan addressed what the Court majority did not, namely the case law regarding the public character of and ensuing State interest in privately owned “public conveyances, inns and places of public amusement” (p. 37). In so doing, he also addressed the foundational finding of the English common law regarding the power of locomotion as a fundamental right that was subsequently affirmed by American case law.

Regarding fundamental rights in general, Justice Harlan pointed out that “the Thirteenth Amendment alone obliterated the race line, so far as all rights fundamental in a state of freedom are concerned” (p. 40). After examining the American case law regarding the legal status of “public conveyances on land and water” through a review of seven cases, Justice Harlan summarized: “The sum of the adjudged cases is that a railroad corporation [or shipping company] is a governmental agency, created primarily for public purposes, and subject to be controlled for the public benefit” (p. 39). Connecting the body of case law to the subject matter before the Court, Justice Harlan opined:

Such being the relations these corporations hold to the public, it would seem that the right of a colored person to use an improved public highway, upon the terms accorded to freemen of other races, is as fundamental, in the state of freedom established in this country, as are any of the rights which my brethren concede to be so far fundamental as to be deemed the essence of civil freedom. (p. 39)

Justice Harlan then connected the findings of American case law and his conclusion regarding that case law to the English common law regarding the subject matter by quoting the finding on the subject of the noted English expert on jurisprudence, William Blackstone: “‘Personal liberty consists,’ says Blackstone, ‘in the power of locomotion, of changing situation, or removing one’s person to whatever places one’s own inclination may direct, without restraint, unless by due course of law’” (p. 39). Applying this to the intent of the Civil Rights Act of 1875, Justice Harlan asked “of what value the right of locomotion” was if it were to continue to be hindered by the very discriminations that “Congress intended ... to remove” (p. 39)? Harlan then connected this discrimination to the institution of slavery that had been abolished by the Thirteenth Amendment:

[Such discrimination cannot] be sustained, except upon the assumption that there is, in this land of universal liberty, a class which may still be discriminated against, even in respect of rights of a character so necessary

and supreme, that, deprived of their enjoyment in common with others, a freeman is not only branded as one inferior and infected, but, in the competitions of life, is robbed of some of the most essential means of existence; and all this solely because they belong to a particular race which the nation has liberated. (pp. 39-40)

Inns being essential for travel, Justice Harlan noted that “the same general observations which have been made as to railroads are applicable to inns” and then cited case law to substantiate his point.

Places of public amusement were not necessarily connected to the right of locomotion; however, Justice Harlan noted, “The authority to establish and maintain them comes from the public. The colored race is a part of that public” (p. 41). Justice Harlan then cited two U.S. Supreme Court decisions affirming government interest in private property when it is used for a public purpose. Particularly focusing upon the Court’s ruling in *Munn v. Illinois*, Harlan noted the Court’s reliance upon English jurisprudence when it quoted Lord Chief Justice Hale’s remarks, “to the effect that when private property is ‘affected with a public interest it ceases to be *juris privati* only’” (p. 42). Justice Harlan continued by citing the Court’s own remarks in *Munn v. Illinois* that followed the statement by the Lord Chief Justice:

Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good... (p. 42)

At this point, Justice Harlan attacked the claim by the Court majority that Congress was attempting by way of the 1875 Civil Rights Act to create a municipal code by legislating in areas reserved to the State. Not so, Harlan declared, “Congress has not, in these matters, entered the domain of State control and supervision” (p. 42). He then explained both “why not” as well as what the Civil Rights Act actually did:

It does not, as I have said, assume to prescribe the general conditions and limitations under which inns, public conveyances, and places of public amusement, shall be conducted or managed. It simply declares, in effect, that since the nation has established universal freedom in the country, for all time, there shall be no discrimination, based merely upon race or color, in respect of the accommodations and advantages of public conveyances, inns, and places of public amusement. (pp. 42-43)

Such discrimination constituted “a badge of servitude” which Congress legitimately sought to “prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment” (p. 43). On Thirteenth Amendment grounds alone, Justice Harlan, declared, the Civil Rights Act of 1875 “is not, in my judgment, repugnant to the Constitution” (p. 43).

Turning his attention to the Fourteenth Amendment, where the Court majority saw remedy for discrimination against black citizens in the states, Justice Harlan saw just the opposite. Noting the passage in several southern states of the notorious Black Codes following the enactment of the Thirteenth Amendment, Justice Harlan pointed out that the intent of such legislation was an attempt “to keep the colored race in a condition, practically, of servitude” (p. 43). Harlan further cited the public announcements by the southern states that

whatever might the rights which persons of that race had, as freemen, under the guarantees of the national Constitution, they could not become citizens of a State, with the privileges belonging to citizens, except by the consent of such State; consequently, that their civil rights, as citizens of the State, depended entirely upon State legislation. (p. 43)

The actions of the southern states against its black citizens following the adoption of the Thirteenth Amendment constituted the primary reason for proposing the Fourteenth Amendment for adoption. Justice Harlan next cited the Court’s own language from a recent case whereby the Court

declared that the one pervading purpose found in all the recent amendments, lying at the foundation of each, and without which none of them would have been suggested – was “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made



freemen and citizen from the oppression of those who had formerly exercised unlimited dominion over him.” (p. 44)

Following this line of reasoning, Justice Harlan directly confronted the Court majority’s incorrect analogy between its position and the constitutional clause by which a State was prohibited from passing any laws that impaired the obligation of contracts. Justice Harlan conducted a brief tutorial for the Court majority in order to show the Court majority why its analogy was not correct because the contract clause did not equal the fifth section of the Fourteenth Amendment’s “scope and effect” (p. 45). First, Justice Harlan noted the constitutional clause regarding contracts:

No express power is given Congress to enforce, by primary direct legislation, the prohibition upon State laws impairing the obligation of contracts. Authority is [instead], conferred to enact all necessary and proper laws for carrying into execution the enumerated powers of Congress and all other powers vested by the constitution in the government of the United States... (p. 45)

Of course, Harlan was referencing Article I, § 8, ¶ 18 of the Constitution, more commonly designated the Necessary and Proper Clause, the clause that provides the “textual justification for the doctrine of implied powers” (Hall, 1992, p. 424). As Justice Harlan further noted, Congress had no authority at the time to legislate directly upon contracts. He explained:

[A] prohibition upon a State is not a *power* in *Congress* or in the *national government*. It is simply a *denial* of *power* to the *State*. And the only mode in which the inhibition upon State laws impairing the obligation of contracts can be enforced, is, indirectly, through the courts, in suits where the parties raise some question as to the constitutional validity of such laws. The judicial power of the United States extends to such suits for the reason that they are suits arising under the Constitution. (Emphasis in original) (p. 45)

The Fourteenth Amendment presented a quite different situation, however, because of Section Five of the Fourteenth Amendment, which reads, “That Congress shall have power to enforce, by appropriate legislation, the provisions of this article” (p. 44). Reaching the conclusion of his

tutorial, Justice Harlan spelled out for the Court majority the landmark significance of Section Five. According to Harlan, Section Five of the Fourteenth Amendment marks an epic milestone in American constitutional history, the inauguration of which sets its provisions quite apart from, and even above, the specified powers enumerated in Article I, § 8 of the Constitution. In Justice Harlan's words:

The Fourteenth Amendment presents the first instance in our history of the investiture of Congress with affirmative power, *by legislation*, to *enforce* an express prohibition upon the States. It is not said that the *judicial* power of the nation may be exerted for the enforcement of that amendment. No enlargement of the judicial power was required, for it is clear that had the fifth section of the Fourteenth Amendment been entirely omitted, the judiciary could have stricken down all State laws and nullified all State proceedings in hostility to rights and privileges secured or recognized by that amendment. The power given is, in terms, by congressional *legislation*, to enforce the provisions of the amendment. (Emphasis in original) (pp. 45-46)

The analogy drawn by the Court majority to justify its interpretation of the Fourteenth Amendment was factually in error as was the Court majority's reasoning.

Justice Harlan next asked, "What are the privileges and immunities to which, by that clause of the Constitution [the first sentence of the first section of the Fourteenth Amendment], they became entitled" (p. 47)? Noting that the answer lay in the "adjudged cases" of the Supreme Court, Justice Harlan summarized the case law on the subject by stating

that they are those which are fundamental in citizenship in a free republican government, such as are "common to the citizens in the latter States under their constitutions and laws by virtue of their being citizens." Of that provision it has been said, with the approval of this court, that no other one in the Constitution has tended so strongly to constitute the citizens of the United States one people. *Ward v. Maryland*, 12 Wall. 418; *Corfield v. Coryell*, 4 Wash. C.C. 371; *Paul v. Virginia*, 8 Wall. 168; *Slaughter-house Cases*, 16 id. 36. (p. 47)

Stopping short of bringing the Guarantee Clause of the Constitution into his legal discussion, but further buttressing his legal point, Justice Harlan brought Article IV, Section 2 of the

Constitution into play, the portion of the Constitution that declares: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Setting the stage for a legal assertion grounded in case law and specifically stated in the Constitution:

I hazard [sic] nothing ... in saying that no State can sustain her denial to colored citizens of other States, while within her limits, of privileges or immunities, fundamental in republican citizenship, upon the ground that she accords such privileges and immunities only to her white citizens and withholds them from her colored citizens. (p. 47)

Justice Harlan then drew what should have been the obvious conclusion for the Court majority:

The colored citizens of other States, within the jurisdiction of that State, could claim, in virtue of section 2 of article 4 of the Constitution, every privilege and immunity which that State secures to her white citizens. ...[T]he constitutional guaranty is that the citizens of each State shall be entitled to “all privileges and immunities of citizens of the several States.” (pp. 47-48)

Further illustrating the paucity of legal reasoning on the part of the Court majority, Justice Harlan continued his discussion of the rights granted the former slaves by the Fourteenth Amendment by citing specific provisions of the Court’s own case law governing the subject. According to Harlan’s reading of the law:

Citizenship in this country necessarily imports at least equality of civil rights among citizens of every race in the same State. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State, ... or by individuals or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude. (p. 48)

To illustrate that he wasn’t grabbing concepts out of the thin air and grounding them in his own prejudices, Justice Harlan particularly drew the following cases and their points to the attention of his fellow justices, cases featuring legal principles firmly grounded in the nation’s case law that had been ignored by the Court majority:

- *United States v. Cruikshank*, 92 U.S. 542, 555.

[T]he rights of life and personal liberty are natural rights of man, and ... “the equality of the rights of citizens is a principle of republicanism.”

- *Ex parte Virginia*, 100 U.S. 334.

[T]he emphatic language of this court is that “one great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States.”

- *Strauder v. West Virginia*, 100 U.S. 306.

[T]he court, alluding to the Fourteenth Amendment, said: “This is one of a series of constitutional provisions having a common purpose, namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.”

- *Neal v. Delaware*, 103 U.S. 386.

[I]t was ruled that this amendment was designed, primarily, “to secure to the colored race, thereby invested with the rights, privileges, and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons.”

(pp. 48-49)

Having established a legal position solidly grounded in the Constitution and its case law, a position fully cognizant of the normal Court procedures to be followed when making constitutional determinations of congressional enactments, Justice Harlan devoted the remainder of his dissenting opinion to a criticism of the position taken by his fellow justices. Having earlier drawn an ironic analogy between previous Court opinions centered on the constitutionality of the two fugitive slave laws and the current Court majority’s maneuverings to avoid following similar procedures, Justice Harlan directly criticized the Court majority.

I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves. (p. 53)

And then Harlan posed the question that was unanswerable for the Court majority, for in order to confront it, they would be forced to abandon their current position:

If fugitive slave laws ... were legitimate exercises of an implied power to protect and enforce a right recognized by the Constitution, why shall the hands of Congress be tied, so that ... it may not, by means of direct legislation, bring the whole power of this nation to bear upon States ... and upon such individuals and corporations exercising public functions as assume to abridge, impair, or deny rights confessedly secured by the supreme law of the land? (p. 53)

Justice Harlan specifically declared that the position assumed by the Court majority was

plainly repugnant to [the Fourteenth Amendment's] fifth section, conferring upon Congress power ... to enforce not merely the provisions containing prohibitions upon the States, but all of the provisions of the amendment, including the provisions, express and implied, in the first clause of the first section of the article granting citizenship. (p. 54)

If allowed to prevail, Justice Harlan concluded, the Court majority's opinion reflected a new "era of constitutional law" whereby the "rights of freedom and American citizenship" would receive less "efficient protection" than that which the Court "unhesitatingly accorded to slavery and the rights of the master" (p. 57).

Characterizing the Court majority's admonishment to the former slaves to stop seeking to be "the special favorite of the laws" and to begin assuming "the rank of a mere citizen" as an unjust statement, Justice Harlan observed that what the Court majority was denying was exactly what they desired to be accomplished by the former slaves. In Harlan's words, "The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens" (p. 61). Continuing, Justice Harlan identified the crux of the real problem:

The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained. (p. 61)

Continuing towards the conclusion of his dissenting opinion, Justice Harlan identified what other students of democracy came to refer to as the tyranny of the majority.

At every step in this direction [that of getting a recognition of the equal rights of black people by virtue of being granted citizenship], the nation has been confronted with *class tyranny*, which a contemporary English historian says is, of all tyrannies, the most intolerable... Today, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. (Emphasis added) (p. 62)

Only thirteen years later, Justice Harlan would again dissent against the Court majority's attempts to legalize what he referred to as a "caste" system (*Plessy v. Ferguson*, 163 U.S. 537, 559). Despite the views of the dominant society, law under the American Constitution recognized no class system, or at least, it shouldn't. Harlan's dissent in *Plessy* applies as well to the subject matter in the *Civil Rights Cases*. In *Plessy*, Justice Harlan described a situation similar to that of the current case.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power.... But in view of the Constitution, in the eye of the law, there is in this country no superior, no dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)

Justice Harlan's concluding words in *Plessy* could just as easily apply to the *Civil Rights Cases*, although more ironically, because the recourse to the States that the 1883 Court recommended for redress of any discrimination suffered by black people was in 1896 being denied them:

It is therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)

Both high courts, regrettably, with the single exception of Justice John Marshall Harlan, confirmed the opposite of what most American students learn in school in either civics or American government classes. The two high courts also confirmed, again regrettably, what Plato

had successfully refuted more than two thousand years ago when taunted by Thrasy Machus in *The Republic*, namely, the assertion by Thrasy Machus that justice was nothing more than the advantage of the stronger party (Cornford, pp. 18, 21, 25). It is especially regrettable for those who believe in the rule of law within a democratic republic under a Constitution that affirms equality under the law. A noted modern-day professor of law at one of the nation's leading law schools made an assessment of Justice Harlan's dissents in the *Civil Rights Cases* and *Plessy v. Ferguson* and their implication for the Fourteenth Amendment. Although most of what follows focuses on Harlan's dissent in *Plessy*, much of it also applies to Harlan's dissent in the *Civil Rights Cases*, particularly since what he had warned against in that case came to pass as subject matter in *Plessy*. According to Professor Akhil Reed Amar:

As Harlan saw it, any law whose preamble explicitly proclaimed blacks to be second-class citizens would plainly violate the Fourteenth Amendment, and the emerging system of racial apartheid known as Jim Crow broadcast precisely this unconstitutional message by its very operation. In purpose, in effect, and in social meaning, Jim Crow stretched its tentacles out to keep blacks down. Its whole point was to privilege whites and degrade blacks, in direct defiance of the Fourteenth Amendment's promise of equal citizenship. (Amar, p. 383)

Professor Amar concluded by noting the similarity of the system of Jim Crow with the Black Codes passed by southern states in the aftermath of the Thirteenth Amendment and the conclusion of the Civil War, after which he noted Justice Harlan's legacy for posterity:

Though Jim Crow slyly claimed to provide formal, symmetric equality ("separate but equal"), in reality it delivered substantive inequality that made its regime practically indistinguishable from the postwar Southern Black Codes – the very set of laws that the amendment had undeniably aimed to abolish. Though Justice Harlan saw all this in 1896, his brethren did not. Not until the middle of the twentieth century would Court majorities embrace Harlan's vision, quietly at first and then with increasing confidence and emphasis. (Amar, p. 383)

***Brown v. Board of Education, 347 U.S. 483 (1954).***

*Case summary.*

Although some twenty-six Supreme Court decisions and the historical backgrounds of both the Tenth and Fourteenth Amendments have since been presented, some readers will recall that *Brown v. Board of Education* was the last case discussed in the chapter focused on the Guarantee Clause (See p. 250+ of this document). In that discussion, material was presented documenting the work of Charles Hamilton Houston and the NAACP in confronting the American system of apartheid ensconced in higher education, a campaign that eventually made its way into the field of public education. The successful campaign orchestrated by Charles Hamilton Houston served as judicial precedents referenced by the Court in its *Brown* decision.

As some will also recall, *Brown* actually consisted of four cases that had been grouped together because each bore on the same legal question, “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities” (p. 493)? Actually there were five court cases centered on the same legal question, but because of a difference in lower court responses to the legal question applying the Equal Protection Clause of the Fourteenth Amendment to public education in various states, four of the cases came to be grouped together for a consolidated legal opinion. The fifth case required a separate High Court opinion because the lower court had actually ruled in favor of the plaintiffs challenging the system of segregated public education in the District of Columbia. While the legal question was basically similar, it differed in that it did not rely on the Equal Protection Clause, but instead upon an unjustifiable denial of due process of law under the Fifth Amendment’s guarantee. The five cases are presented in Table 7. The procedural history of the four combined cases will be treated first followed by the consolidated opinion that will forever be known as *Brown v. Board*



of Education, or more simply, *Brown*. Finally, the background, procedural history, and a discussion of the Court's ruling in *Bolling v. Sharpe* will be presented.

*Table 7:*  
*Groupings of Legal Challenges to the System of Segregation in Public Education*<sup>106</sup>

**Lower Court Denied Equal Protection Challenge – 14th Amendment**

*Brown v. Topeka Board of Education*

*Briggs et al. v. Elliott et al.*

*Davis et al. v. County School Board of Prince Edward County, Virginia*

*Gebhart et al. v. Belton et al.*

**Lower Court Affirmed Due Process Challenge – 5th Amendment**

*Bolling et al. v. Sharpe et al.*

In the original legal challenge to segregated public education in Topeka, Kansas, (*Brown v. Board of Education*) that later came to bear the name of the consolidated opinion, elementary children in Topeka filed action in the U.S. District Court for the District of Kansas “to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students” (p. 486, n. 1). The District Court, consisting of a three-judge panel, ruled that “segregation in public education has a detrimental effect upon Negro children,” but it “denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers” (p. 486, n. 1). The U.S. Supreme Court granted the request for appeal.

Plaintiffs in the South Carolina case, *Briggs v. Elliott*, were elementary and high school students in Clarendon County. They filed suit in the U.S. District Court for the Eastern District of South Carolina seeking an injunction to stop enforcement of sections in the state's constitution and statutes that required “the segregation of Negroes and whites in public schools” (p. 486, n.

1). “The three-judge District Court” denied the relief requested by the plaintiffs, but “found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities” (p. 486, n. 1). The District Court “ordered the defendants to begin immediately to equalize the facilities,” but denied admission to the white schools for the plaintiffs during the process of the equalization program (p. 486, n. 1). The U.S. Supreme Court vacated the decision and remanded for hearing on the progress of the equalization program. Following that hearing which found progress in the states equalization program, the Supreme Court granted plaintiff’s request for appeal.

Plaintiffs in the Virginia case, *Davis v. County School Board*, were high school students in Prince Edward County. Filing suit in U.S. District Court for the Eastern District of Virginia, they sought an injunction to stop enforcement of the state constitutional and statutory code provisions requiring “the segregation of Negroes and whites in public schools” (p. 487, n. 1). In *Davis v. County School Board*, a three-judge panel denied the injunction, but “found the Negro school inferior in physical plant, curricula, and transportation” (p. 487, n. 1). Similar to the South Carolina case, the District Court ordered the defendants to provide the plaintiffs an equal program while denying them admission to white schools while the equalization program was being undertaken. The U.S. Supreme Court granted the plaintiffs’ request for appeal.

The ruling in the Delaware case, *Gebhart v. Belton*, contained an interesting statement that “segregation itself results in an inferior education for Negro children” (p. 488, n. 1). The case was filed in the Delaware Court of Chancery on behalf of elementary and high school students living in New Castle County. Like the suits in South Carolina and Virginia, plaintiffs sought an injunction stop the constitutional and statutory requirements that required segregation in the state’s public schools. Unlike the federal courts in Virginia and South Carolina, however,

the “Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children” because of the enumerated conditions of inferiority in the Negro schools (p. 487, n. 1). Upon appeal the Supreme Court of Delaware affirmed the Chancellor’s ruling, but suggested that “the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished” (p. 488, n. 1). The defendants appealed only the “immediate admission of the Negro plaintiffs to the white schools” to the U.S. Supreme Court who agreed to review the case.

The case emanating from Kansas was a challenge to a state statute that *permitted, but did not require* segregation in the state’s public schools. On the other hand, state statutes in South Carolina, Virginia, and Delaware *required* the segregation of black and white students in public schools in their states. This raises at least two questions: 1) how did the various states address the issue of apartheid in public education; and 2) how pervasive was the system *de jure* segregation in the United States at the time of the ruling in *Brown v. Board of Education*? Table 8 below provides comparative groupings<sup>107</sup> of data that will address the two questions arising from an inquiry into the system of segregated schools in public education.

In addition to being a decision bearing on four cases combined into one ruling because they shared a common legal question, *Brown* actually consisted of two separate rulings, the first on the merits and the second on the relief. They are sometimes referred to as *Brown I*, 347 U.S. 483 (1954) and *Brown II*, 349 U.S. 294 (1955). The two decisions resulted from Chief Justice Warren’s proposal to the Court justices to separate the two decisions in order to reduce the monumental questions involved to manageable scope (Hall, 1999, pp. 34-35). *Brown I* also consisted of an original argument on December 9, 1952 followed by a re-argument on December 8, 1953 (For information about the attorneys arguing for the preservation of segregated public

education, see Appendix W; for information about the attorneys arguing against segregated schools in public education, see Appendix X). *Brown II* resulted after hearing re-argument regarding the questions of who should be responsible for ensuring that the relief is provided and at what pace it should occur. *Brown I* held that separate but equal had no place in public education while *Brown II* ordered that school desegregation should proceed with “all deliberate speed” (349 U.S. 294).

*Table 8:*  
*States With Laws Providing For Schools To Be*  
*Segregated By Race For Students in Public Education in 1954*<sup>108</sup>

<b>States Whose Laws REQUIRED Public School Segregation Based On Race – Grouped By Geographic Region</b>			
<b>Border States</b>		<b>The Deep South</b>	
Delaware	Oklahoma	Alabama	Mississippi
Kentucky	Virginia	Arkansas	North Carolina
Maryland	West Virginia	Florida	South Carolina
Missouri		Georgia	Tennessee
		Louisiana	Texas
<b>States Whose Laws PERMITTED, BUT DIDN'T REQUIRE Public School Segregation Based On Race</b>			
Arizona	Kansas	New Mexico	Wyoming

In its unanimous 9-0 ruling the Supreme Court noted that in “each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called ‘separate but equal’ doctrine announced by this Court in *Plessy v. Ferguson*, 163 U.S. 537” (p. 488). The Court also noted plaintiffs’ contention, “that segregated public schools are not ‘equal’ and cannot be made ‘equal,’ and that hence they are deprived of the equal protection of the laws” (p. 488). Turning to the subject of education, the Court declared:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. (p. 493)

Having pointed to the value of education in preparing young people to exercise the fundamental responsibilities of citizenship when they became adults, the Court continued its reasoning by drawing attention to the value of education as a preparation for future life's work:

Today, it [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (p. 493)

Coming to the heart of the matter, the Court noted:

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. (p. 493)

The Court explained its reasoning in terms of the psychological damage caused by segregation.

To separate them from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs... (p. 494)

Commenting that the "extent of psychological knowledge at the time of *Plessy v. Ferguson*" was unknown, the Court stated that the findings of psychological damage were "amply supported by modern authority" and declared, "Any language in *Plessy v. Ferguson* contrary to this finding is rejected" (pp. 494-495). Continuing, the Court announced its conclusion:

We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. (p. 495)

Before closing, Chief Justice Warren repeated, “We have now announced that such segregation is a denial of the equal protection of the laws” (p. 495).

The roots of *Bolling v. Sharpe* can be traced to congressional authorization of a system of segregated public schools in Washington, D.C., the schools having been “segregated since Civil War days under laws passed by Congress (Huston, p. 1). This situation flowed from the fact that the District of Columbia resides solely under federal jurisdiction. Owing to this unique circumstance, a legal challenge to segregated public schools in the nation’s capitol had to be based on “the Fifth Amendment since the Fourteenth Amendment did not apply to Congress” (Alexander & Alexander, p. 410).

*Bolling v. Sharpe* represented the culmination of a series of challenges mounted by a parent group in Washington, D.C. In 1847 Gardner Bishop, a barber and the father of a fourteen-year-old daughter, provided leadership for a group of parents concerned about the poor quality of junior high school education being offered their children. Organized as the “Consolidated Parent Group,” they mounted a campaign to end segregation in Washington, D.C.’s public schools (McNeil, p. 188). Charles Hamilton Houston provided legal counsel for the group as they mounted successive challenges in the U.S. District Court for Washington, D.C. (McNeil, p. 189). When Houston became ill, his place was taken by a colleague and law professor from Howard University, James Nabrit, Jr. (National Park Service, *Bolling v. Sharpe*, ¶ 2).

Besides differing from the four cases consolidated in the *Brown* decision by reason of basing the case on the Fifth Amendment instead of the Fourteenth Amendment for reasons

already given, Nabrit had not presented “evidence that schools the plaintiffs attended were inferior to the facilities for white students” as he “felt the sole issue was that of segregation itself” (National Park Service, *Bolling v. Sharpe*, ¶ 2). As a result, Nabrit argued that “segregation deprive[d] them [“minors of the Negro race”] of due process of law under the Fifth Amendment” (*Bolling v. Sharpe*, 347 U.S. 497, 498). After the case had been dismissed by the District Court for the District of Columbia on the basis of *Carr v. Corning* (a case which held that segregated public schools in the District of Columbia were constitutional) and an appeal had been made to the Court of Appeals, the U.S. Supreme Court “granted a writ of certiorari before judgment in the Court of Appeals because of the importance of the constitutional question presented” (347 U.S. 497, 498).

As he had in the cases consolidated under *Brown v. Board of Education*, Chief Justice Earl Warren delivered the Court’s opinion in *Bolling v. Sharpe*. Noting that while the Fifth Amendment did “not contain an equal protection clause” similar to the Fourteenth Amendment, the unanimous Court observed that “the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive” (347 U.S. 497, 499). Furthermore, the Court continued, “discrimination may be so unjustifiable as to be violative of due process,” a recognition acknowledged by three previous cases which were cited (347 U.S. 497, 499). The Court announced a finding integral to its ruling: “Segregation in public education is not reasonably related to any proper governmental objective” (347 U.S. 497, 500). Accordingly, segregation in public education “imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause” (347 U.S. 497, 500). Announcing the holding of the unanimous Supreme Court, Chief Justice Earl Warren declared, “We hold that racial segregation in the public schools of the

District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution” (347 U.S. 497, 500).

*Significance for the fourteenth amendment.*

The *Brown* decision overturned the doctrine of “Separate but Equal” emanating from the *Plessy* decision, but did not overturn *Plessy* itself. *Brown* focused solely on the applicability of *Plessy* to the field of public education. The Fourteenth Amendment arguments articulated by Justice John Marshall Harlan in both the *Civil Rights Cases* and *Plessy v. Ferguson* finally bore fruit following their application to the campaign orchestrated by Charles Hamilton Houston with assistance from Thurgood Marshall and the NAACP attacking *Plessy*’s doctrine of “Separate but Equal” in higher education.

The *Brown* decision marked a major turning point in our nation’s history. For the first time, state-sponsored racial segregation in more than one state was deemed to be contrary to the Equal Protection Clause of the Fourteenth Amendment to our nation’s Constitution. The intent of the original framers of that amendment had finally been broadly realized, although it had taken almost a full century for their efforts to finally bear fruit on a national scale. Although the Fourteenth Amendment had overturned the Taney Court’s *Dred Scott* decision, its active enforcement had been thwarted by the Court in the *Civil Rights Cases* and *Plessy v. Ferguson* until the Warren Court overturned *Plessy v. Ferguson* in the field of public education and began the process of restoring the Fourteenth Amendment to its original purpose. One expert on constitutional law denoted the era begun by the Court’s decision in *Brown* as a Second

Reconstruction:

Four score years after the Founding, a new generation arose to transform what their fathers had brought forth on the continent. In what can only be described as a constitutional revolution, the nation ended slavery, made every person born under the flag an equal citizen, guaranteed a host of civil



rights to all Americans, and extended equal political rights to black men. Hard as it was to get America to make these promises, getting her to keep them would prove harder still. Full compliance would not occur until a Second Reconstruction in the late twentieth century. (Amar, 2005, p. 351)

Following the *Brown II* decision, the federal judiciary “was faced with southern school boards and state governments that were typically committed to the philosophy of ‘massive resistance’ to desegregation” (Hall, 1992, p. 703). One historian looking on events in American from across the ocean described the aftermath:

[T]he process of dismantling segregation could not be plain sailing. For one thing, to attack it in the schools was to attack it everywhere. The structure of white supremacy tottered. The Deep South rose in wrath and came together in fear. It resolved to evade or defeat this decision as it had so many others, and in carrying out this resolution it had, to start with, considerable success. *Brown v. Board of Education* turned out to be only the first blow in a new battle in the long, long war. (Brogan, p. 647)

As part of the massive campaign of southern resistance to desegregating public schools, two states amended their state’s constitutional provisions governing public education. South Carolina “repealed” the mandatory provision from its state constitution “directing the establishment of a system of public schools,” while Mississippi amended its state constitution to make “its constitutional provision discretionary with the state legislature” (*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 112, n. 69 [Marshall, J., dissenting]).

Nothing quite matched what happened in Virginia, however. Describing what happened in Prince Edward County, the Supreme Court observed, “Efforts to desegregate Prince Edward County’s schools met with resistance” (*Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 221). In 1956, Virginia amended its state constitution “to authorize the General Assembly ... to appropriate funds to assist students to go to public or to nonsectarian private schools” (377 U.S. 218, 221). The state legislature also enacted legislation that closed public schools that were integrated. The Court provided the following description:

The General Assembly met in special session and enacted legislation to close any public schools where white and colored children were enrolled together, to cut off state funds to such schools, to pay tuition grants to children in nonsectarian private schools, and to extend state retirement benefits to teachers in newly created private schools. (377 U.S. 218, 221)

Following the actions taken in special session by Virginia's General Assembly, the Supervisors of Prince Edward County adopted a resolution declaring "that they would not operate public schools 'wherein white and colored children are taught together'" (377 U.S. 218, 222). Also, the County School Board of Prince Edward County, acting "pursuant to state law, closed its public schools and provided tuition grants and tax credits to private schools attended only by white children" (Hall, 1992, p. 350).

Three years later, the Supreme Court of Appeals of Virginia ruled that the state's "legislation closing mixed schools and cutting off state funds" to integrated public schools violated Virginia's constitution (377 U.S. 218, 221). The U.S. Supreme Court described the Virginia state legislature's response to the state high court's ruling:

In April 1959 the General Assembly abandoned "massive resistance" to desegregation and turned instead to what was called a "freedom of choice" program. The Assembly repealed the rest of the 1956 legislation, as well as a tuition grant law of January 1959, and enacted a new tuition grant program. At the same time the Assembly repealed Virginia's compulsory attendance laws and instead made school attendance a matter of local opinion. (377 U.S. 218, 221-222)

Prince Edward County, however, did not end its campaign of resistance to integrating its public schools. Pursuant to its resolution of 1956 declaring opposition to the operation of integrated schools, "the Supervisors of Prince Edward County refused to levy any school taxes for the 1959-1960 school year" (377 U.S. 218, 222). The U.S. Supreme Court described the resulting consequences:

As a result, the county's public schools [which had been closed in 1956] did not reopen in the fall of 1959 and have remained closed ever since, although

the public schools of every other county in Virginia have continued to operate under laws governing the State's public school system and to draw funds provided by the State for that purpose. (377 U.S. 218, 222-223)

The Court also described additional actions taken in Prince Edward County:

A private group, the Prince Edward School Foundation, was formed to operate private schools for white children in Prince Edward County and, having built its own school plant, has been in operation ever since the closing of the public schools [in 1956]. An offer to set up private schools for colored children in the county was rejected, the Negroes of Prince Edward preferring to continue the legal battle for desegregated public schools... (377 U.S. 218, 223)

In 1961 Allen, Griffin, and other parents of black children in Prince Edward County “filed a supplemental complaint” in the United States District Court for the Eastern District of Virginia that sought an order enjoining officials in Prince Edward County “from refusing to operate an efficient system of public free schools in Prince Edward County” (377 U.S. 218, 224). In addition, the parents sought an injunction prohibiting the “payment of public funds to help support private schools which excluded students on account of race” (377 U.S. 218, 224). The federal District Court for the Eastern District of Virginia found that “the end result of every action taken by that body [Board of Supervisors] [sic] was designed to preserve separation of the races in the schools of Prince Edward County” (377 U.S. 218, 224). As a result, the District Court

enjoined the county from paying tuition grants or giving tax credits so long as public schools remained closed. *Allen v. County School Board of Prince Edward County*, 198 F. Supp. 497, 503 (D.C.E.D. Va. 1961). At this time the District Court did not pass on whether the public schools of the county could be closed but abstained pending determination by the Virginia courts of whether the constitution and laws of Virginia required the public schools to be kept open. (377 U.S. 218, 224)

Griffin and other parents had also initiated a mandamus proceeding in state court seeking an order to require that the Prince Edward County Board of Supervisors resume levying taxes for

public education. In *Griffin v. Board of Supervisors of Prince Edward County*, 203 Va. 321 (1962), the Virginia High Court “held that the State Constitution and statutes did not impose upon the County Board of Supervisors any mandatory duty to levy taxes and appropriate money to support free public schools” (377 U.S. 218, 224, n. 9). At about the same time, but previous to the Virginia Supreme Court’s ruling in *Griffin v. Board of Supervisors of Prince Edward County*, the United States District Court for the Eastern District of Virginia completed its ruling in *Allen v. County School Board of Prince Edward County*, 207 F. Supp. 349, 355 (D.C.E.D. Va. 1962) in which the U.S. District Court

held that “the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers.” (377 U.S. 218, 224)

Immediately after the U.S. District Court for the Eastern District of Virginia issued its final ruling (described immediately preceding), the Board of Supervisors for Prince Edward County and the County School Board of Prince Edward County filed a “declaratory judgment suit ... in a Virginia Circuit Court” and at the same time “asked the Federal District Court to abstain from further proceedings until the suit in the state courts had run its course” (377 U.S. 218, 225). The U.S. District Court for the Eastern District of Virginia refused the request from Prince Edward County officials and instead “repeated its order that Prince Edward’s public schools might not be closed to avoid desegregation while the other public schools in Virginia remained open” (377 U.S. 218, 225). Upon appeal, the U.S. Court of Appeals for the Fourth Circuit (with one judge dissenting) [*Griffin v. Board of Supervisors of Prince Edward County*, 322 F. 2d 332 (C.A. 4th Cir. 1963)] reversed the U.S. District Court’s decision, holding that the lower federal court should have waited until the state courts had made a determination of the issues. The U.S. Supreme Court “granted certiorari” while at the same time,

the Supreme Court of Appeals of Virginia had held that the Virginia Constitution did not compel the State to reopen public schools in Prince Edward County. *County School Board of Prince Edward County v. Griffin*, 204 Va. 650, 133 S.E. 2d 565 (1963). (377 U.S. 218, 225, n. 10)

In *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), some ten years following the *Brown I* decision, the U.S. Supreme Court authorized “the district court ... to enjoin further use of grants and credits,” stipulated “that the court could superintend the board’s taxing and appropriation powers,” and empowered the district court to “order the public schools reopened,” if necessary (Hall, 1992, p. 351). The preceding holdings were based upon the following basic finding:

[T]he record in the present case could not be clearer that Prince Edward’s public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State’s allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional. (377 U.S. 218, 231)

In a note appended to the last sentence of the preceding quotation, the Court recalled an earlier pronouncement: “‘But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.’ *Brown v. Board of Education*, 349 U.S. 294, 300 (1955)” (377 U.S. 218, 231, n. 12).

Recounting the legal struggles centered on *Brown* and its aftermath, while illuminating, do not address the extreme human costs underlying such struggles. Black students in Prince Edward County who should have entered first grade when the public schools were closed (prior to the beginning of the 1956-1957 school year with entry into private white schools in the county being denied anyone who was not white), such students should normally have been ready to enter high school as ninth-graders in the 1964-1965 school year following the U.S. Supreme

Court's decision announced on May 25, 1964, in *Griffin v. County School Board of Prince Edward County*. Instead, most such students were denied their elementary and junior high school education because of extreme racial prejudice exercised against them by the racist white adult voters and officials of Prince Edward County, aided and abetted by racist white adults controlling the Virginia legislature who organized a campaign of massive state resistance to a U.S. Supreme Court decision. While many of the white racists perhaps professed belief in Christianity, they certainly did not practice its foundational precepts. This would be neither the first, nor the last, time such a conflict would be enacted between professed beliefs and actual actions.

In terms of its impact upon segregated school districts, "Brown was remarkably ineffectual. By 1964, a decade after the first decision less than 2 percent of formerly segregated school districts had experienced any desegregation" (Hall, 1992, p. 95). This same writer went on to note, however, that

*Brown* was a potent catalyst for ambitious social change, both in Congress, where the aspirations of *Brown* helped prompt the Civil Rights Act of 1964 and the Voting Rights Act of 1965, among others, and in the federal courts themselves... (Hall, 1992, p. 95)

Some, however, would argue that the most powerful result flowing from the *Brown* decision and the accompanying campaign of southern resistance to implementing the law of the land was the Civil Rights Movement, a movement whose success in touching the nation's conscience through exposure of the brutal inhumanity and lawlessness of southern resistance was more directly responsible for congressional action than was *Brown*.

***Serrano v. Priest, 487 P.2d 1241 (1971).***

*Facts & procedural history.*

Beginning as a class action suit filed in Superior Court, Los Angeles County, “by elementary and high school pupils and parents” who were “concerned with financing of California public school systems,” the case reached the Supreme Court of California on appeal following the lower court’s dismissal of the lawsuit and the Court of Appeal’s ruling upholding the lower court’s ruling (p. 1241, 1266). The Superior Court, Los Angeles County, had dismissed the case, citing the U.S. Supreme Court’s ruling in *McInnis* (a case challenging the Illinois system of public school financing) when it sustained “defendants’ demurrers” (p. 1263). Seeking both “declaratory and injunctive relief” (p. 1244) from the California Supreme Court, the plaintiffs sought the following:

- (1) a declaration that the present financing system is unconstitutional; (2) an order directing defendants to reallocate school funds in order to remedy this invalidity; and (3) an adjudication that the trial court retain jurisdiction of the action so that it may restructure the system if defendants and the state Legislature fail to act within a reasonable time. (p. 1245)

Defendants in *Serrano v. Priest* included “the Treasurer, the Superintendent of Public Instruction, and the Controller of the State of California, as well as the Tax Collector and Treasurer, and the Superintendent of Schools of the County of Los Angeles” (p. 1244).

*Legal question.*

For our purposes, the main legal question was, “Does the ‘California public school financing system, with its substantial dependence on local property taxes and resultant wide disparities in school revenue, violate the equal protection clause of the Fourteenth Amendment’” (p. 1244)? A secondary question centered on the applicability of the nation’s High Court’s affirmation of *McInnis* to the subject matter of *Serrano v. Priest*.

*Legal reasoning of opposing parties.*

Legal counsel for the defendants argued that California's financing scheme did not discriminate on the basis of wealth by pointing to two components of that scheme: "[T]hrough *basic* aid, the state distributes school funds equally to all pupils; through *equalization* aid, it distributes funds in a manner beneficial to the poor districts" (Emphasis in original) (p. 1250). Defense attorneys also argued that "the wealth of a school district does not necessarily reflect the wealth of the families who live there" (p. 1252). Defense counsel also attacked the notion that classification by wealth violated the Fourteenth Amendment's Equal Protection Clause. "[C]lassification by wealth is constitutional so long as the wealth is that of the district, not the individual" (p. 1252). Finally, according to defense attorneys, "[A]ny unequal treatment is only de facto, not de jure. Since the United States Supreme Court has not held de facto school segregation on the basis of race to be unconstitutional, ...de facto classifications on the basis of wealth are presumptively valid" (p. 1253). Finally, defendants' legal counsel asserted that

the applicability of the equal protection clause to school financing ha[d] already been resolved adversely to plaintiffs' claims by the Supreme Court's summary affirmance in *McInnis v. Shapiro*, *supra*, 293 F.Supp. 327, *affd.* Mem. Sub nom. *McInnis v. Ogilvie* (1969) 394 U.S. 44, 90 S.Ct. 812, 25 L. Ed.2d. 37. (p. 1263)

Attorneys for plaintiffs argued that California's system for financing public education causes "substantial disparities in the quality and extent of availability of educational opportunities" (p. 1244). As a result, plaintiff attorneys continued, the "educational opportunities made available to ... plaintiff children are substantially inferior to the educational opportunities made available to children attending public schools in many other districts of the State..." (p. 1244). Therefore, plaintiffs' legal counsel concluded, "The financing scheme thus fails to meet the requirements of the equal protection clause of the Fourteenth Amendment of the United States Constitution and the California Constitution..." (p. 1244).



*Holding & disposition.*

Announcing the major finding of the California Supreme Court, Justice Sullivan declared, “We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child’s education a function of the wealth of his parents and neighbors” (p. 1244). Continuing, Justice Sullivan announced the state high court’s 6-1 ruling in terms of the intersection of education with the Equal Protection Clause which required the application of strict scrutiny:

Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded, therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause. (p. 1244)

Reversing the judgment of the lower court, the California Supreme Court “remanded” the case “to the trial court with directions to overrule the demurrers and to allow defendants a reasonable time within which to answer” (p. 1266).

*Court’s rationale.*

In addressing the legal issues under dispute in *Serrano v. Priest*, the California Supreme Court conducted a four-part examination. The subject matter contained in each of the four parts included the following:

- California’s system of financing public school education;
- plaintiff’s argument that the school financing system violated the California State Constitution;
- the intersection of the Fourteenth Amendment’s Equal Protection Clause and the subject matter of California’s public school financing system.

- the applicability of the Equal Protection Clause to public school financing systems in light of the *McInnis* decision.

In tracing the California High Court's response to each subject area listed previously, the reader will be able to follow the rationale used by the California Supreme Court in reaching its decision.

Noting that local property taxes constituted "by far the major source of school revenue," the California High Court observed that the "amount of revenue which a district can raise in this manner thus depends largely on its tax base – i.e., the assessed valuation of real property within its borders" (p. 1246). Observing that tax bases varied "widely throughout the state," the State Supreme Court further noted that California distributed about half of the state's educational funds (not to be confused with the funds raised within each district by its property tax levy) on a "uniform per pupil basis to all districts, irrespective of a district's wealth" (pp. 1247, 1248).

According to the California Supreme Court, this "basic aid ... actually widens the gap between rich and poor districts" because poor districts get that amount as part of equalizing funds while wealthy districts too rich to qualify for the equalizing funds still receive the basic uniform grant (p. 1248). Table 9 below illustrates the variability of funding available for educational purposes across the state which the State Supreme Court used as provided by the state's legislative analyst (p. 1247, n. 9). Citing multiple sources, the California Supreme Court noted that California's situation wasn't that different from other states. "Similar spending disparities have been noted throughout the country, particularly when suburban communities and urban ghettos are compared" (p. 1247, n. 9). Noting the difference in funds available to children in "Baldwin Park" and "Beverly Hills," the court characterized the variance as an "economic chasm" (p. 1248).

*Table 9:  
California Public School Districts: Range of 1969-1970  
Assessed Valuations Per Pupil As Well As the Range of Per Pupil Expenditures*

<b>Assessed Valuations Per Pupil</b>			
	<u>Elementary</u>	<u>High School</u>	
<u>Low</u>	\$ 103	\$ 11,959	
<u>Median</u>	\$ 19,600	\$ 41,300	
<u>High</u>	\$ 952,156	\$ 349,093	
<b>Per Pupil Expenditures</b>			
	<u>Elementary</u>	<u>High School</u>	<u>Unified</u>
<u>Low</u>	\$ 407	\$ 722	\$ 622
<u>Median</u>	\$ 672	\$ 898	\$ 766
<u>High</u>	\$ 2,586	\$ 1,767	\$ 2,414

Satisfied that it had adequately “outlined the basic framework of California school financing,” the court next addressed the constitutionality of that system under Article IX, Section 5 of the California Constitution which stated: “The Legislature shall provide for *a system of common schools* by which a free school shall be kept up and supported in each district at least six months in every year” (Emphasis in original) (p. 1248). Rejecting the argument that California’s system of financing schools violated the California Constitution, the Court pointed out that it had previously defined “system” as implying “a ‘unity of purpose, as well as an entirety of operation’” (p. 1248). Continuing its elucidation, the California Supreme Court explained:

[W]e have never interpreted the constitutional provision to require equal school spending; we have ruled only that the educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade. (p. 1249)

The Supreme Court of California next moved to the next issue, that involving the major question of the case, as to whether or not the “California public school financing scheme violates

the equal protection clause of the Fourteenth Amendment to the United States Constitution” (p. 1249). In doing so, the California Supreme Court addressed the following issues in order as listed below:

- the tests required “for measuring legislative classifications against the equal protection clause” (p. 1249);
- the issue of “wealth as a suspect classification” (p. 1250);
- the claim of “education as a fundamental interest” (p. 1255); and
- the question of whether or not the current financing system is “necessary to accomplish a compelling state interest” (p. 1259).

The California High Court distinguished between a rational basis test and the strict scrutiny test as used by the U.S. Supreme Court in “measuring legislative classifications against the equal protection clause” (p. 1249). Explaining the rational basis test, the California Supreme Court observed:

In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. (p. 1249)

However, cases that either entail “suspect classifications” or involve “fundamental interests” require use of a more “active and critical analysis” that subjects “the classification to strict scrutiny” (p. 1249). The California Court explained:

Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose. (Emphasis in original) (p. 1249)

Next the Supreme Court of California moved to the question of whether wealth constitutes a suspect classification that would require use of the strict scrutiny standard.

Drawing upon the record of the nation's High Court, the California justices noted:

In recent years, the United States Supreme Court has demonstrated a marked antipathy toward legislative classifications which discriminate on the basis of certain "suspect" personal characteristics. One factor which has repeatedly come under the close scrutiny of the high court is wealth. "Lines drawn on the basis of wealth or property, like those of race [citation], are traditionally disfavored." (*Harper v. Virginia State Bd. Of Elections* (1966) 383 U.S. 663, 668...) (p. 1250)

Connecting the issue of wealth to the legal issue at hand, the state court observed:

Plaintiffs contend that the school financing system classifies on the basis of wealth. We find this proposition irrefutable. As we have already discussed, over half of all education revenue is raised locally by levying taxes on real property in the individual school districts. (p. 1250)

The California Supreme Court also pointed out that "as a practical matter districts with small tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent districts reap with minimal tax efforts" (p. 1250). The State Supreme Court of California concluded: "Thus, affluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all" (pp. 1251-1252). And, the state high court further observed,

The commercial and industrial property which augments a district's tax base is distributed unevenly throughout the state. To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments. Surely, this is to rely on the most irrelevant of factors as the basis for educational financing. (pp. 1252-1253)

Having shown that wealth is a suspect classification that would require the use of the strict scrutiny test to determine applicability of the Fourteenth Amendment's Equal Protection Clause, the state court subsequently moved to connect California's system of financing public education

to wealth as a suspect classification. According to the California Supreme Court, “In sum, we are of the view that the school financing system discriminates on the basis of the wealth of a district and its residents” (p. 1255).

The Supreme Court of California next addressed the question of whether or not education could be identified as a “fundamental interest” (p. 1255). The state high court first began by scrutinizing “the indispensable role which education plays in the modern industrial state” (p. 1255). The California Supreme Court continued:

This role, we believe, has two significant aspects: first, education is a major determinant of an individual’s chances for economic and social success in our competitive society; second, education is a unique influence on a child’s development as a citizen and his participation in political and community life. (pp. 1255-1256)

The court summarized the importance of education by observing that “education is the lifeline of both the individual and society” (p. 1256). Before citing both U.S. Supreme Court and California Supreme Court cases in which the “fundamental importance of education [was] recognized,” the California High Court noted that the cases were “not of precedential value because they do not consider education in the context of wealth discrimination” (p. 1256, n. 23). However, the court continued, “Our quotation of these cases is not intended to suggest that they *control* the legal result which we reach here, but simply that they eloquently express the crucial importance of education” (Emphasis in original) (p. 1256, n. 23).

After citing specific descriptions of education’s importance from *Brown v. Board of Education*, the California Supreme Court turned attention to its own case law, focusing on descriptions that emphasized the “twin themes of the importance of education to the individual and to society” (p. 1257). The Supreme Court of California next noted that it was

illuminating to compare in importance the right to an education with the rights of defendants in criminal cases and the right to vote – two

‘fundamental interests’ which the Supreme Court has already protected against discrimination based on wealth. (p. 1257)

“The analogy between education and voting is much more direct,” the state court observed, because “both are crucial to participation in, and the functioning of, a democracy” (p. 1258). Concluding its examination of education as a fundamental interest, the California Supreme Court declared, “We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a ‘fundamental interest’” (p. 1258).

Having reached a finding that the California system of financing public education was based on wealth, which is a suspect classification, and having identified education as a fundamental interest, and having thus reached the point where the “‘strict scrutiny’ equal protection standard” was required to ascertain whether or not the state had a compelling interest in creating a system of financing public education based on wealth that involved a subject matter of fundamental interest, i.e., education, the Supreme Court of California next addressed the required question (p. 1259). Following a three-page examination of the question regarding the issue of compelling interest for the state government, the court announced its finding.

We find that such a financing system as presently constituted is not necessary to the attainment of any compelling state interest. Since it does not withstand the requisite “strict scrutiny,” it denies to the plaintiffs and others similarly situated the equal protection of the laws. If the allegations of the complaint are sustained, the financial system must fall and the statutes comprising it must be found unconstitutional. (p. 1263)

Moving to the final question, the California Supreme Court addressed the claim that the U.S. Supreme Court’s affirmation of the decision reached by the “three-judge federal district court” in *McInnis v. Shapiro* in 1969 prevented the “applicability of the equal protection clause to school financing” (p. 1263). The *McInnis* case had challenged the Illinois system of financing public education. However, according to the California Supreme Court, the contentions of

plaintiffs in the two cases were “significantly different” (p. 1264). In *Serrano*, the plaintiffs contended that “discrimination on the basis of wealth is an inherently suspect classification which may be justified only on the basis of a compelling state interest” (p. 1264). In *McInnis*, plaintiffs contended that “educational needs” is “the proper standard for measuring school financing against the equal protection clause” (p. 1265). According to the California court, “[T]he nonjusticiability of the ‘educational needs’ standard was the basis for the *McInnis* holding” (p. 1265). The California court explained: “The district court found this a ‘nebulous concept’ – so nebulous as to render the issue nonjusticiable for lack of ‘discoverable and manageable standards’” (p. 1265). The California court concluded its examination of *McInnis* by the following finding: “In this context, a Supreme Court affirmance can hardly be considered dispositive of the significant and complex constitutional questions presented here” (p. 1265).

Reaching its final finding that would govern its holding that the California system of financing public school education was unconstitutional because of conflict with the Equal Protection Clause of the Fourteenth Amendment, the California Supreme Court declared:

[W]e are satisfied that plaintiff children have alleged facts showing that the public school financing system denies them equal protection of the laws because it produces substantial disparities among school districts in the amount of revenue available for education. (p. 1265)

*Concurring/dissenting opinions.*

Justice McComb dissented, but offered no separate opinion, stating that he agreed with Justice Dunn’s opinion in “the Court of Appeal in *Serrano v. Priest*, 10 Cal.App.3d 1110, 89 Cal.Rptr. 345” (p. 1266).

***San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).***

*Facts & procedural history.*



The original plaintiffs in the case, who became the appellees upon the original defendants' appeal to the U.S. Supreme Court being granted a hearing, Demetrio Rodriguez and other Mexican-American parents residing in the Edgewood Independent School District, filed a class action lawsuit "on behalf of schoolchildren throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base" (p. 5). Plaintiffs' suit was filed in the United States District Court for the Western District of Texas. Their suit argued

that the Texas system's reliance on local property taxation favors the more affluent and violates equal protection requirements because of substantial interdistrict disparities in per-pupil expenditures resulting primarily from differences in the value of assessable property among the districts. (p. 1)

Defendants named in the initial legal action, some of whom became the appellants upon appealing to have their legal issues heard by the U.S. Supreme Court following the initial case, were originally the "seven school districts in the San Antonio metropolitan area" as well as "the State Board of Education, the Commissioner of Education, the State Attorney General, and the Bexar County (San Antonio) Board of Trustees" (p. 5, n. 2; p. 5). One needs a scorecard to keep track of the San Antonio School District throughout the entire legal process of this case. Originally named a defendant in the case, it and the other named school districts were dismissed from the case by the District Court as a result of "a pretrial conference" (p. 5, n. 2). Following their dismissal from the original case by the "three-judge court ... impaneled" to try the case, the San Antonio School District *joined* the Mexican-American "plaintiffs' challenge to the State's school finance system (Emphasis added) (p. 6; p. 5, n. 2). Upon the appeal by the State of Texas to be heard by the U.S. Supreme Court, the San Antonio School District "filed an *amicus curiae* brief in support of" the original plaintiffs of the case (Emphasis in original) (p. 5, n. 2). Although dismissed as a defendant in the original case, the original name given to the case,

*Rodriguez et al. v. San Antonio Independent School District et al.* remained. The names were reversed following the defendants' legal defeat at the federal district court level and ensuing appeal that was granted by the U.S. Supreme Court.

Originally filed during “the summer of 1968” in the federal district court serving the federal jurisdictional district of western Texas by the plaintiff parents, a “three-judge court was impaneled in January 1969” to try the case (p. 6). The U.S. District Court, Western District of Texas, then delayed the trial for two years in order to “permit extensive pretrial discovery and to allow completion of a pending Texas legislative investigation concerning the need for reform of its public school finance system” (p. 6, n. 4). Following the issuance of the report, *Public School Finance Problems in Texas*, prepared by the Texas Research League, the Texas “legislature failed to act in its 1971 Regular Session,” a failure that was characterized by the Justice Marshall as follows: “The strong vested interest of property-rich districts in the existing property tax scheme poses a substantial barrier to self-initiated legislative reform in educational financing” (p. 71, n. 2, Marshall, J. , dissenting). According to Justice Marshall’s reading of the evidentiary record, “It was only after the legislature failed to act ... that the District Court, apparently recognizing the lack of hope for self-initiated legislative reform, rendered its decision” (p. 71, n. 2, Marshall, J., dissenting).

In December 1971, the three-judge panel for the United States District Court for the Western District of Texas issued its decision “in a *per curiam* opinion [a decision rendered by the whole court instead of by a single judge]<sup>109</sup> holding the Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment” (p. 6).

The District Court, finding that wealth is a “suspect” classification and that education is a “fundamental” right, concluded that the system could be upheld only upon a showing, which appellants [the State of Texas] failed to make, that there was a compelling state interest for the system. The court

also concluded that appellants [the State of Texas] failed even to demonstrate a reasonable or rational basis for the State's system. (pp. 1-2)

Upon appeal by the State of Texas, the U.S. Supreme Court "noted probable jurisdiction to consider the far-reaching constitutional questions presented" (p. 6).

*Legal question.*

The Court addressed three primary legal questions. First, does the Texas system of financing public school education "operate to the peculiar disadvantage of any suspect class" in violation of the Equal Protection Clause of the Fourteenth Amendment (p. 28)? Second, does the Texas school finance scheme "interfere with the exercise of a 'fundamental' right," namely education, and thus "require the application of the strict standard of judicial review" (p. 29)? Third, does the Texas system of school finance "bear some rational relationship to legitimate state purposes" that have been "articulated" by the state (pp. 40, 17)?

*Legal reasoning of opposing parties.*

Attorneys for the appellees/original plaintiffs in the case asserted that the Texas school finance system relied primarily upon local property taxes which operated to the detriment "of poor families residing in school districts having a low property tax base" while "favor[ing] the more affluent" (p. 1). Operating in this fashion, the school finance system creates "substantial interdistrict disparities in per-pupil expenditures" which results in poorer quality educational opportunities for students in property-poor districts (p. 1). The Texas school finance system thus creates discrimination based on wealth in violation of the Equal Protection Clause of the Fourteenth Amendment. Furthermore, because such discrimination impairs students' abilities to enjoy the fundamental right of education, the judicial standard used to measure the Texas school finance system against the Equal Protection Clause should be the judicial standard of strict scrutiny.

Attorneys for the appellants/original defendants in the case conceded “the existence of major disparities in spendable funds” for Texas school districts to use in educating students residing within their boundaries (p. 64). However, they continued,

the disparities do not invidiously discriminate against children and families in districts such as Edgewood, because the Texas scheme is designed “to provide an adequate education for all, with local autonomy to go beyond that as individual school districts desire and are able.... It leaves to the people of each district the choice whether to go beyond the minimum and, if so, by how much.” (p. 64)

The Texas school finance system does not discriminate on the basis of wealth, but instead has created “the Texas Minimum Foundation School Program” in order “to help offset disparities in local spending” ability (p. 9). The use of the strict scrutiny judicial standard is therefore not warranted. Furthermore, if subjected to the “strict judicial scrutiny” standard, “the Texas financing system and its counterpart in virtually every other State will not pass muster” (pp. 16, 17).

*Holding & disposition.*

By the slimmest of margins, the Court issued a 5-4 decision for the appellant State of Texas and “reversed” the decision of the United States District Court for the Western District of Texas (p. 2). Justices Powell, Burger, Stewart, Blackmun, and Rehnquist constituted the slim majority while Justices Brennan, White, Douglas, and Marshall dissented in written opinions. Holdings announced by the Court included the following:

- “The Texas system does not disadvantage any suspect class” (p. 2). The Texas school finance system does not discriminate based on wealth.
- “Nor does the Texas school-financing system impermissibly interfere with the exercise of a ‘fundamental’ right or liberty” (p. 2). While important, education “is

not within the limited category of rights recognized by this Court as guaranteed by the Constitution” (p. 2).

- “This is not a proper case in which to examine a State’s laws under standards of strict judicial scrutiny” (p. 2).
- “The Texas system” of school finance, while “concededly imperfect, ... bears a rational relationship to a legitimate state purpose” (p. 2).

*Court’s rationale.*

Before arguments in the case were heard before the national bar of justice in Washington, D.C., the justices received briefs of *amici curiae* arguing for the Court to reverse the federal district court’s decision in *Rodriguez v. San Antonio Independent School District* from thirty (30) states, or from 60% of the states in the union, more formally called The United States of America. Almost all of the briefs were submitted from the State Attorney General’s office in the various states. The states, listed alphabetically, are shown below in Table 10 as listed in a note of the Court’s opinion (pp. 3-4).

*Table 10*  
*States Submitting Briefs to the Supreme Court Urging Reversal*  
*of the District Court Ruling, Rodriguez v. San Antonio Independent School District*

Alabama	Iowa	Missouri	South Carolina
Arizona	Kansas	Nebraska	South Dakota
California	Kentucky	New Hampshire	Tennessee
Colorado	Louisiana	New Jersey	Utah
Connecticut	Maine	New York	Vermont
Idaho	Maryland	North Carolina	West Virginia
Indiana	Massachusetts	North Dakota	Wisconsin
	Mississippi	Oregon	

States filing briefs of *amici curiae* urging the Supreme Court to affirm the lower court’s ruling were fewer in number: one from the Governor of Minnesota (p. 4, note). Interestingly, while the

attorney general's office for California filed a brief urging reversal, the Superintendent of Public Instruction of California and the Controller of California both submitted briefs urging affirmation of the lower court's ruling. Briefs urging affirmation of the lower court ruling were also submitted by the San Antonio Independent School District as well as from an attorney representing John Serrano, Jr. et al (pp. 4-5, note). When you include the State of Texas, appellant in the legal action before the nation's highest court, thirty-one states felt their state's system for financing public education was jeopardized by the federal district court's ruling in *Rodriguez v. San Antonio Independent School District*.

Writing for the slender majority of five justices, Justice Powell delivered the 5-4 decision of the Supreme Court in *San Antonio Independent School District v. Rodriguez*. Beginning with an examination of the historical development of the Texas system of school finance in order to establish "the framework for our analysis," Justice Powell described the tasks to be addressed by the opinion:

We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. (p. 17)

He continued:

If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. (p. 17)

Next, while nominally addressing the legal questions posed previously, Justice Powell actually began critiquing the District Court's analysis and findings in the case. First summarizing the lower court's steps and analysis, Justice Powell concluded by announcing, "Indeed, for the

several reasons that follow, we find neither the suspect-classification nor the fundamental-interest analysis persuasive” (p. 18). He spent the rest of the opinion explaining that assertion.

In Justice Powell’s view, in confronting the issue of wealth as a suspect classification with regards to state school finance schemes, the District Court for the Western District of Texas “relied on decisions dealing with the rights of indigents to equal treatment in the criminal trial and appellate processes, and on cases disapproving wealth restrictions on the right to vote,” and “regarded those precedents as controlling” (p. 18). Justice Powell referenced the following decisions in which “school-financing laws in other States” were “struck down” (p. 18):

*Serrano v. Priest*, 5 Cal. 3d 584, 487 P. 2d 1241 (1971); *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (Minn. 1971); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A. 2d 187 (1972); *Milliken v. Green*, 389 Mich. 1, 203 N.W. 2d 457 (1972, rehearing granted, Jan. 1973).

Powell characterized the process these courts used in reaching their findings of wealth being a suspect classification in school finance schemes as “a simplistic process of analysis” that “largely ignore[d] the hard threshold questions” that need to be considered prior to a determination that “a State’s laws and the justifications for the classifications they [the State’s laws] create are [to be] subjected to strict judicial scrutiny” (p. 19). The threshold questions were necessary, in Justice Powell’s view, because precedents from two other subject matters, i.e., rights of criminals (to legal counsel, etc.) and the right to vote (polling taxes & filing fees to vote in primary elections), that shared “distinguishing characteristics” were being applied to a third subject matter, public school financing systems (p. 20). The different subject matters of criminal rights and the right to vote shared these characteristics, according to Powell’s opinion:

The individuals, or groups of individuals, who constituted the class discriminated against ... shared two distinguishing characteristics: because of their impecuniness they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. (p. 20)

Continuing to proceed with a narrow interpretation, Powell articulated the majority opinion's view that the two critical threshold questions included asking "whether it makes a difference ... that the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms" as well as inquiring "whether the relative – rather than absolute – nature of the asserted deprivation is of significant consequence" (p. 19). Later, Justice Powell explained what he meant by a "relative – rather than absolute" deprivation.

The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. (p. 23)

Powell then noted that "a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages" (p. 24).

Continuing to focus on the term "poor" as applied to individuals, instead of the term "poverty" as applied to school districts and their residents who are poor as defined by relative status in terms of assessed valuations for property taxes, Justice Powell observed that the Federal District Court for the Western District of Texas made "no definitive description of the classifying facts or delineation of the disfavored class" (p. 19). However, Powell's study "of the District Court's opinion and of appellees' complaint, briefs, and contentions at oral argument" revealed "at least three ways in which the discrimination" could be described (p. 19). According to Justice Powell:

The Texas system of school financing might be regarded as discriminating (1) against "poor" persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally "indigent," or (2) against those who are relatively poorer than others, or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts. (pp. 19-20)



Powell then proceeded to eliminate the first two categories, first by citing a Connecticut study of school districts which “concluded that ‘[i]t is clearly incorrect ... to contend that the ‘poor’ live in ‘poor’ districts;” and second, by observing that “there is no basis on the record in this case for assuming that the poorest people – defined by reference to any level of absolute impecunity – are concentrated in the poorest districts” (p. 23). Powell never directly confronted, however, the third category that he had discovered from an examination of the legal record, that regarding the category of people who “happen to reside in relatively poorer school districts” (p. 20). Instead, he disingenuously focused on that claim being not based on any absolute deprivation, but instead characterized the deprivation as being a relative one in comparison to the higher quality education received by children residing in affluent districts in terms of assessed valuation for property tax purposes.

In the manner illustrated by the preceding material, Justice Powell reached the point where he could announce an initial determination reached by the narrow majority of the Court’s finding regarding the first legal question: “Does the Texas system of financing public school education “operate to the peculiar disadvantage of any suspect class” in violation of the Equal Protection Clause of the Fourteenth Amendment (p. 28)? According to Powell:

For these two reasons – the absence of any evidence that the financing system discriminates against any definable category of “poor” people or that it results in the absolute deprivation of education – the disadvantaged class is not susceptible of identification in traditional terms. (p. 25)

Since, according to the slim Court majority, the disadvantaged class was not traditionally identifiable, it must mean that the Court was being asked to apply the strict scrutiny standard to something novel. As described by Justice Powell:

[A]ppelles’ suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and

amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. (p. 28)

He continued to distance the subject matter of the case from his view of traditional norms:

The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. (p. 28)

Powell then announced the Court's initial finding in answer to the first legal question referenced previously: "We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class" (p. 28).

The slender Court majority next focused on the question of whether education was a "'fundamental' right," a right with which interference in receiving would require "the application of the strict standard of judicial review" (p. 29). The Court began by citing *Brown's* views on the importance of education "in the context of racial discrimination" (p. 29). After identifying the theme of *Brown's* view on the "importance of education to our democratic society" as "expressing an abiding respect for the vital role of education in a free society," and after noting multiple decisions of the Court which contained a similar view, Justice Powell framed his view of the issue: "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause" (p. 30). Powell then followed up by citing remarks by a fellow justice (who was voting with him in the current case), Justice Stewart, in *Shapiro v. Thompson*, 394 U.S. at 642:

The Court today does *not* "pick out particular human activities, characterize them as 'fundamental,' and give them added protection ...." To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands. (Emphasis in original) (p. 31)

After citing further cases articulating a similar view as expressed by Justice Stewart in *Shapiro*, Justice Powell summarized the “lesson of these cases in addressing the question now before the Court...” (p. 33). According to Powell’s summary:

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is “fundamental” is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. (p. 33)

“Rather, the answer,” Justice Powell concluded, “lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution” (pp. 33-34). Immediately finding the answer he sought, Justice Powell declared: “Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected” (p. 35). Addressing the connection between education and the “individual’s right to speak and to vote,” Powell observed that the Court had “never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice” (p. 36). While effective speech and an educated citizenry able to make effective election decisions were “desirable goals of a system of freedom of expression and of a representative form of government,” such goals “are not values to be implemented by judicial intrusion into otherwise legitimate state activities” (p. 36). Instead, these goals should “be pursued by a people whose thoughts and beliefs are freed from governmental interference” (p. 36). But, the narrow Court majority continued:

Even if it were conceded that ... education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. (pp. 36-37)

Announcing the Court majority's answer to the second legal question regarding whether education was a fundamental right whose exercise fell under the protection of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, Justice Powell issued an indirect answer: "We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive" (p. 37).

Having previously found that the Texas school finance system does not discriminate on the basis of wealth, and having also found that education is not a fundamental right whose exercise would be protected by the Equal Protection Clause should it have been found to be a fundamental right, the Court next ruled on the question regarding the proper judicial standard to be employed in examining the complaints against the system of public school finance in Texas. According to Justice Powell's opinion for the 5-4 majority in *San Antonio Independent School District v. Rodriguez*:

[T]his is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.... A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes. (p. 40)

During the course of the Court's examination of the state's rational basis for the Texas system for financing public education, the Court addressed several topics, one of which included the important role played by states in serving as laboratories of experimentation to "try novel social and economic experiments" in the scheme of federalism characterized previously by Justice Brandeis in "*New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting)" (p. 50). Justice Powell also referred numerous times to the benefits of local control

and the proper role of the judiciary in a constitutional democracy. Given the nature of these topics, the discerning reader could easily ascertain the Court majority's destined finding.

Nevertheless, a brief tracing of the footsteps taken in reaching the obvious conclusion might be helpful.

Regarding the limits of the judiciary, Justice Powell first pointed out that what the Court was being asked to do lay outside its traditional area of expertise:

We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. (p. 40)

Continuing in the same vein while at the same time connecting expertise with the theme of local control, Justice Powell again observed:

Thus, we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and *the familiarity with local problems so necessary to the making of wise decisions* with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. (Emphasis added) (p. 41)

Maintaining a steady course, Justice Powell subsequently augmented the connection he'd made between the judicial lack of expertise in certain areas requiring that deference be given to legislatures as well as the notion that respect be accorded the notion of local control. In Justice Powell's view:

In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. (p. 42)

Continuing the same vein of argument, Justice Powell next connected the Court's lack of expertise in areas deferred to legislatures and the notion of local control to a third thematic area,

that of experimentation by the states in order to find solutions to complex issues. Tentatively at first, Powell pointed out that “[t]he very complexity of the problems of financing and managing a statewide public school system suggests that ‘there will be more than one constitutionally permissible method of solving them’” (p. 42). Communicated somewhat stronger the next time regarding the need for experimentation, Justice Powell continued connecting this thread to those centered on judicial deference:

The ultimate wisdom as to ... problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap *the continued research and experimentation* so vital to finding even partial solutions to educational problems.... (Emphasis added) (p. 43)

Justice Powell would return to the need for states to serve as laboratories of experimentation in his examination of the rational basis of the Texas scheme for financing public education and explicitly reference Justice Brandeis comments in that discussion. Finally, as will be shown, Powell would include a major reference to states as laboratories again in announcing the Court’s finding on the last remaining legal question centered on a rational basis for the Texas school financing system.

The five-justice majority disagreed with the District Court’s finding “that the State had failed even ‘to establish a reasonable basis’ for a system that results in different levels of per-pupil expenditure” (p. 47). For evidence in support of its assertion, Justice Powell, writing for himself and the four justices aligned with him, offered evidence in two parts. The first part centered on the similarity between the Texas school finance scheme and that found in other states. As Justice Powell opined, “In its reliance on state as well as local resources, the Texas system is comparable to the systems employed in virtually every other State” (pp. 47-48).

Justice Powell would return to this theme again in the penultimate sentence immediately prior to his announcement of the five-justice majority's holding as to the rational basis for the Texas system of financing public education. As Justice Powell observed:

One also must remember that the system here challenged is not peculiar to Texas or to any other State. In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. (p. 55)

In other words, to declare that the Texas scheme of financing education had no rational basis related to a legitimate state objective would be tantamount to invalidating school finance schemes in every other state.

The second evidentiary part of the Court majority's assertion that the Texas system rested on a rational basis resided in its scheme's implementation of the "foundation grant" theory as developed by "two New York educational reformers in the 1920's, George D. Strayer and Robert M. Haig" (p. 48). Justice Powell cited from the forward to Strayer and Haig's 1923 work, *The Financing of Education in the State of New York*, written by Professor Coleman to emphasize that the Strayer-Haig thesis rested upon accommodating the competing forces described by the following:

The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children. (p. 49)

Powell immediately followed the preceding quotation with this assertion: "The Texas system of school finance is responsive to these two forces" (p. 49). Buttressing the connection between local control as articulated by the Strayer-Haig thesis and the Texas school finance scheme, Justice Powell inserted comments by two current justices (Stewart and Rehnquist, both of whom were in the five-justice majority of the current decision) centering on the importance of local

control that were made in a Court decision rendered just the previous term. Since local control contributed to pluralism, Justice Powell then addressed the connection between pluralism and experimentation as first articulated by Justice Brandeis. According to Justice Powell:

Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to "serve as a laboratory; and try novel social and economic experiments." No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education. (p. 50)

Somewhat ironically, Justice Powell noted that local control lay at the heart of the appellees' (original plaintiffs) legal challenge to the Texas scheme of financing public education. In Justice Powell's view:

Appellees do not question the propriety of Texas' dedication to local control of education. To the contrary, they attack the school-financing system precisely because, in their view, it does not provide the same level of local control and fiscal flexibility in all districts. *Appellees suggest that local control could be preserved and promoted under other financing systems that resulted in more equality in educational expenditures.* (Emphasis added) (p. 50)

Addressing the issue of inequities found between school districts in Texas immediately prior to rendering a decision about the third legal question of the case, Powell stated:

In sum, to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. (pp. 54-55)

Unifying previous threads of reasoning regarding local control, states as laboratories of experimentation, and judicial deference to legislatures in areas residing outside of judicial expertise, Justice Powell presented the five-justice majority's finding regarding the third legal question, the rational basis test for the Texas school finance scheme:



We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested. The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate purpose or interest. *McGinnis v. Royster*, 410 U.S. 263, 270 (1973). We hold that the Texas plan *abundantly* satisfies this standard. (Emphasis added) (p. 55)

*Concurring/dissenting opinions.*

Justice Stewart offered a concurring opinion in which he further buttressed the slender Court majority's unwillingness to venture into uncharted waters on judicial grounds. Admitting the validity of the parents' complaints, he closed the door on judicial relief as the means of addressing those complaints. According to Justice Stewart:

The method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust. It does not follow, however, and I cannot find, that this system violates the Constitution of the United States. (p. 59)

Offering his view that the Equal Protection Clause conferred "no substantive rights and created no substantive liberties," and that the proper function, therefore, of the Equal Protection Clause "is simply to measure the validity of *classifications* created by state laws," Justice Stewart further offered his explanation of what that meant (Emphasis in original) (p. 59):

There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes. And with respect to such legislation, it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory – only by classifications that are wholly arbitrary or capricious. (p. 60)

Three "vigorous" dissenting opinions were filed by the four justices not agreeing with the reasoning of their fellow justices who composed the five-member majority (Hall, 1992, p. 754). One was filed by Justice William Brennan, another was filed by Justice Byron White, who was

joined by Justice Brennan and Justice William O. Douglas, and the third dissent, the longest of the three, was filed by Justice Thurgood Marshall, who was joined by Justice Douglas.

While Justice Brennan joined Justice White's dissent, he also offered a separate dissent in which he stated that education was a fundamental right. Justice Brennan disagreed totally "with the Court's rather distressing assertion that a right may be deemed 'fundamental' for the purposes of equal protection analysis only if it is 'explicitly or implicitly guaranteed by the Constitution'" (p. 62). Referencing his agreement with Justice Marshall's reasoning regarding fundamental rights, Justice Brennan explained his own position:

Here [in this case], there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment... This being so, any classification affecting education must be subjected to strict judicial scrutiny... (p. 63)

Reaching his conclusion, Justice Brennan observed: "[S]ince even the State concedes that the statutory scheme now before us cannot pass constitutional muster under this stricter standard of review, I can only conclude that the Texas school-financing scheme is constitutionally invalid" (p. 63).

Justice White, joined by Justices Douglas and Brennan, employed the rational basis scrutiny to the same subject matter as the five-member majority; however, he came to a completely opposite result. Agreeing with the three-judge panel of the Federal District Court for the Western District of Texas, Justices White, Douglas, and Brennan found no rational basis for the Texas scheme of public school finance. Unlike the justices in the slim majority, Justice White didn't find credible the assertion by the State of Texas that "the Texas scheme is designed 'to provide an adequate education for all, with local autonomy to go beyond that as individual school districts desire and are able'" (p. 64). Referencing the comparisons made between

Alamo Heights (a property-rich district in the San Antonio metropolitan area) and Edgewood (a property-poor district whose parents initiated the legal action under discussion), Justice White pointed out the following for his brethren in the majority:

The difficulty with the Texas system, however, is that it provides a meaningful option to Alamo Heights and like school districts but almost none to Edgewood and those other districts with a low per-pupil real estate tax base. In these latter districts, no matter how desirous parents are of supporting their schools with greater revenues, it is impossible to do so through the use of the real estate property tax. In these districts, the Texas system utterly fails to extend a realistic choice to parents... (pp. 64-65)

In other words, the stated purpose of the financing scheme in Texas is to provide local control and offer districts a choice of spending more than the minimum amount provided. However, as Justices White, Douglass, and Brennan point out in Justice White's dissenting opinion, property-poor districts do not have the choice to spend more if they so desire. The classification scheme put in place by a heavy reliance on property taxes does not therefore relate to the state objective, that "of maximizing local initiative" (p. 67). In Justice White's words:

If the State aims at maximizing local initiative and local choice, by permitting school districts to resort to the real property tax if they choose to do so, *it utterly fails in achieving its purpose* in districts with property tax bases so low that there is little if any opportunity for interested parents, rich or poor, to augment school district revenues. (Emphasis added) (p. 68)

Characterizing the equal protection analysis conducted by the five-member majority as "no more than an empty gesture" because it didn't require "the State to show that the means chosen to effectuate [its] goal are rationally related to its achievement," Justice White concluded: "In my view, the parents and children in Edgewood, and in like districts, suffer from an invidious discrimination violative of the Equal Protection Clause" (p. 68).

Nor did Justices White, Douglas, and Brennan have any “difficulty in identifying the class that is subject to the alleged discrimination and that is entitled to the benefits of the Equal Protection Clause” (p. 69). Justice White explained:

I need go no farther than the parents and children in the Edgewood district, ... who assert that they are entitled to the same choice as Alamo Heights to augment local expenditures for schools but are denied that choice by state law. This group constitutes a class sufficiently definite to invoke the protection of the Constitution. (p. 69)

Drawing an analogy to a class defined similarly by the Court, Justice White declared: “They [the parents and children of Edgewood] are as entitled to the protection of the Equal Protection Clause as were the voters in allegedly underrepresented counties in the reapportionment cases” (p. 69).

In his dissent, Justice Marshall identified multiple instances of flawed reasoning and avoidance of legal analysis on the part of the five-member majority opinion authored by Justice Powell. Justice Marshall declared his view of the five-member majority’s decision in the second sentence of his dissenting opinion. In Marshall’s view, the decision marked “an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth” (p. 70). Justice Marshall continued:

More unfortunately, though, the majority’s holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. (pp. 69-70)

Using an analogy that could have drawn upon the gambler’s shell game in which attention is diverted from the real object, Marshall implied the Court majority had substituted rhetoric in place of needed legal analysis. According to Marshall, instead of “closely examining the

seriousness of these disparities and the invidiousness of the Texas financing scheme,” the Court majority instead chose to elaborate upon “the efforts Texas has purportedly made to close the gaps between its districts in terms of levels of district wealth and resulting educational funding” (p. 72). In effect, the Court had created a smoke screen in order to shade the real issue, according to Justice Marshall:

Yet, ... the issue in this case is not whether Texas is doing its best to ameliorate the worst features of a discriminatory scheme but, rather, whether the scheme itself is in fact unconstitutionally discriminatory in the face of the Fourteenth Amendment’s guarantee of equal protection of the laws. (p. 72)

Justice Marshall ridiculed the assertion by the State of Texas that “there is no denial of equal educational opportunity to any Texas schoolchildren as a result of the widely varying per-pupil spending power provided districts under the current financing scheme” (p. 83). According to Justice Marshall, “It is an inescapable fact that if one district has more funds available per pupil than another district, the former will have greater choice in educational planning than will the latter” (pp. 83-84). Referencing a Supreme Court case with which he was familiar from his practice as an attorney with the NAACP, Justice Marshall quoted:

That a child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds – and thus with greater choice in educational planning – may nevertheless excel is to the credit of the child, not the State, cf. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 349 (1938). (p. 84)

Justice Marshall took issue with the Court majority’s acceptance of a minimum level of education that the State of Texas argued was supplied by their school finance scheme. Again, the Court majority missed the point. In Justice Marshall’s view:

But this Court has never suggested that because some “adequate” level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not

addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that “all persons similarly circumstanced shall be treated alike.” *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). (p. 89)

In Justice Marshall’s view, sufficient evidence substantiated the wide disparities in educational funding that occurred as a result of the state’s finance scheme, which should have raised red flags for the justices.

Here, appellees have made a substantial showing of wide variations in educational funding and the resulting educational opportunity afforded to the school children of Texas. This discrimination is, in large measure, attributable to significant disparities in the taxable wealth of local Texas school districts. This is a sufficient showing to raise a substantial question of discriminatory state action in violation of the Equal Protection Clause. (p. 90)

Marshall ridiculed the Court majority’s use of the rational basis standard to judge the school finance scheme as an avoidance of “the telling task of searching for a substantial state interest which the Texas financing scheme, with its variations in taxable district property wealth, is necessary to further” (p. 98). By testing “the Texas scheme” against a “lenient standard of rationality” that has “traditionally [been] applied to discriminatory state action in the context of economic and commercial matters,” the five-member majority promoted the “emasculatation of the Equal Protection Clause in the context of this case” (p. 98).

In the context of proposing how the Court could proceed in adjudicating equal protection claims, Justice Marshall found fault with the Court’s “rigidified approach to equal protection analysis,” an approach that wasn’t borne out by an examination of existing case law (p. 98).

The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review – strict scrutiny or mere rationality. But this Court’s decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. (p. 98)

Justice Marshall continued his explanation by describing the type of equal protection analysis to which he was referring:

I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued – that is, an approach in which “concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.” (p. 99)

Justice Marshall proceeded to discuss the case law of rights receiving strict scrutiny protection that were not mentioned in the Constitution, including the “right to procreate,” the “right to vote in state elections,” and the “right to an appeal from a criminal conviction” (p. 100). While agreeing with the Court majority “that the process of determining which interests are fundamental is a difficult one,” Justice Marshall stated that it was not “insurmountable” (p. 102). Marshall countered both the view that the process of determining fundamental rights would “necessarily degenerate into an unprincipled, subjective ‘picking-and-choosing’ between various interests as well as the view that the Court would be involved “in creating ‘substantive constitutional rights in the name of guaranteeing equal protection of the laws’” by simply stating he didn’t agree with such views. To counter those views, he offered a specific process distilled from the Court’s own case law. Basically, Justice Marshall drew attention to the fact that the exercise of constitutionally guaranteed rights often either depended upon or were connected significantly to other factors, some of which were fundamental to the exercise of that right while others were not. Fundamental rights needed to be connected to a constitutionally guaranteed right. The critical process was an examination of the nexus between a constitutional right and a possibly fundamental right. The stronger the connection, the more fundamental a right could become along with a corresponding adjustment of the type of judicial scrutiny to be applied to

alleged infringements of that nonconstitutional interest. According to Justice Marshall's description:

Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. (pp. 102-103)

Justice Marshall then proceeded to discuss specific cases wherein the Court applied higher standards of judicial scrutiny to state laws instead of adhering to "highly tolerant standards of traditional review" (p. 104). Summarizing his review, Justice Marshall observed:

In summary, it seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification. (p. 109)

Continuing, Justice Marshall summarized the difference between his interpretation and that of the five-member Court majority:

The majority suggests, however, that a variable standard of review would give this Court the appearance of a "super-legislature." I cannot agree. Such an approach seems to me a part of the guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that document. (p. 109)

Justice Marshall then moved to an examination of the importance of education relative to other endeavors as well as the nexus between education and various constitutional rights in illustration of the analytical process he had proposed. Near the end of this analysis, Justice Marshall criticized the Court majority for "seek[ing] refuge in the fact that the Court has 'never presumed to ... guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice'" (Emphasis in original) (p. 115). "This," criticized Justice Marshall, "serves



only to blur what is in fact at stake” (p. 115). Marshall continued, “[T]he issue is neither provision of the most *effective* speech nor of the most *informed* vote. Appellees do not now seek the best education Texas might provide” (Emphasis in original) (pp. 115-116). Justice Marshall turned the focus upon what the appellees were seeking:

They do seek, however, an end to state discrimination resulting from the unequal distribution of taxable district property wealth that directly impairs the ability of some districts to provide the same educational opportunity that other districts can provide with the same or even substantially less tax effort. (p. 116)

Having identified the location whereby the Court majority went off the track of proper legal analysis, and having focused attention upon the appellee complaint in terms of alleged state discrimination that possibly impaired a fundamental right, Justice Marshall stated both the issue and the question facing the Court that had been ignored by the Court majority.

The *issue* is, in other words, one of discrimination that affects the quality of the education which Texas has chosen to provide its children; and, the *precise question* here is what importance should attach to education for purposes of equal protection analysis of that discrimination. (Emphasis added) (p. 116)

Referencing the Court’s decision in *Brown*, Justice Marshall concluded his discussion of education and constitutional issues as follows:

As this Court held in *Brown v. Board of Education*, 347 U.S., at 493, the opportunity of education, “where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” The factors just considered, including the relationship between education and the social and political interests enshrined within the Constitution, compel us to recognize the fundamentality of education and to scrutinize with appropriate care the bases for state discrimination affecting equality of educational opportunity in Texas’ school districts... (p. 116)

Several pages later, Justice Marshall concluded his dissent with a simple declaration: “I would therefore affirm the judgment of the District Court” (p. 133).

*Aftermath of the case.*

For the decade following the Court's decision in *San Antonio Independent School District v. Rodriguez*, Texas tried "equalization" reforms of its school finance system in order to reduce the inequities flowing from its scheme; however, they failed (Hall, 1992, p. 754). Since federal routes through the court system for a redress of grievances had been closed, in 1984 Rodriguez and other parents, with assistance from the Mexican American Legal Defense and Education Fund, filed suit in state court "on behalf of the Edgewood district" (Hall, 1992, p. 754). The legal papers alleged "that Texas school finance policy violated the Texas constitution (Hall, 1992, p. 754).

The case reached the Texas Supreme Court where the justices, in a unanimous vote in October 1989, found "for the petitioners in *Edgewood v. Kirby* (1989)" (Hall, 1992, p. 754).

According to an historical account, the Texas Supreme Court

declared that the legislature had failed "to establish and make suitable provision for ... an efficient system of public free schools" throughout the state, as mandated by Article VII of the Texas constitution. Existent inequality among the districts ... affronted the constitutional vision of efficiency. (Hall, 1992, p. 754)

Describing the Texas high court's order, the account also situated Texas in the context of other states experiencing legal challenges to their system of financing public education:

The court ordered the legislature to redesign its school finance system by 1 May 1990, so that districts would have access to relatively equal revenues per pupil when making equal tax efforts. With this decision, Texas became the tenth state to have its state supreme court declare a school finance law in violation of the state constitution. (Hall, 1992, p. 754)

***Plyler v. Doe, 457 U.S. 202 (1982).***

*Facts & procedural history.*

In September 1988, a class action lawsuit was filed in the U.S. District Court for the Eastern District of Texas "on behalf of school-age children of Mexican origin ... who could not

establish that they had been legally admitted into the United States” (p. 206). Plyler, the Superintendent of the Tyler Independent School District, along with board members of the same school district were listed as defendants. Upon the suit being filed, “the State of Texas intervened as a party-defendant” (p. 206). Under Texas law, the plaintiff children were excluded from attending any of the public schools in the Tyler ISD because of their undocumented status. Besides providing for the exclusion from public educational services in school districts across Texas, the state law also prohibited districts from receiving any state funds for the education of undocumented children. The class action lawsuit aimed to stop both practices, whose purpose was to exclude the children of illegal aliens from being educated in the public schools.

The District Court for the Eastern District of Texas issued a preliminary injunction “enjoining defendants from denying a free education to members of the plaintiff class” after determining that such a class (undocumented children of school age whose parents were Mexican) existed within the school district boundaries (p. 206). Three months later the district court “conducted an extensive hearing on plaintiff’s motion for permanent injunctive relief” (p. 206). Making “extensive findings of fact,” the federal District Court for the Eastern District of Texas “held that illegal aliens were entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment” and granted a permanent injunction against implementation and enforcement of the Texas statute complained of in the legal action (p. 208). Following appeal being granted, the “Fifth Circuit Court upheld the District Court’s injunction” (p. 208).

While *Plyler v. Doe* was in the appeal process, more suits were filed in 1978 and 1979 “in the United States District Courts for the Southern, Western, and Northern Districts of Texas” (p. 209). All of the suits challenged the constitutionality of the Texas statute directed against school-age children of undocumented status. All of the lawsuits “named the State of Texas and

the Texas Education Agency as defendants, along with local officials” (p. 209). A federal “Judicial Panel ... consolidated the claims against the state officials into a single action to be heard in the District Court for the Southern District of Texas” (p. 209). Designated *In re Alien Children Education Litigation*, 501 F. Supp. 544, the Federal Court for the Southern District of Texas held that the Texas statute “violated the Equal Protection Clause of the Fourteenth Amendment;” the court further ruled that “the absolute deprivation of education should trigger strict judicial scrutiny, particularly when the absolute deprivation is the result of complete inability to pay [tuition] for the desired benefit” (p. 209). The Fifth Circuit Court of Appeals “summarily affirmed the decision of the Southern District” (p. 210).

Upon notification to the parties of “probable jurisdiction,” the U.S. Supreme Court consolidated both *Plyler v. Doe* and *In re Alien Children Litigation* “for briefing and argument” (p. 210).

*Legal question.*

May the State of Texas “deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens” without violating the Equal Protection Clause of the Fourteenth Amendment (p. 205)? In addressing this question, the Court would break it into two component parts: 1) Are illegal aliens entitled to the equal protection of the laws under the Fourteenth Amendment; and 2) Does the state law refusing reimbursement to school districts for the education of illegal aliens violate the Equal Protection Clause?

*Legal reasoning of opposing parties.*

Attorneys for the State of Texas argued that “persons who have entered the United States illegally are not ‘within the jurisdiction’ of a State even if they are present within a State’s

boundaries and subject to its laws” (p. 211). As a result, undocumented aliens “have no right to the equal protection of Texas law” (p. 210). Attorneys for Texas also offered the following justifications for the law excluding illegal immigrants from public education: 1) “the State may seek to protect itself from an influx of illegal immigrants” (p. 228); 2) “undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State’s ability to provide high-quality public education” (p. 229); and finally, 3):

undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State. (pp. 2229-230).

Attorneys for the representatives of school-age undocumented children argued that the “Fourteenth Amendment provides that ‘[n]o State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to *any person within its jurisdiction* the equal protection of the laws” (Emphasis in original) (p. 210). The phrase “within its jurisdiction” refers “to all within the boundaries of a State” (p. 212). Since Texas provides a system of free public education, it cannot legally exclude school-age, undocumented children residing within the state’s boundaries. The Fourteenth Amendment controls the issue because children are being unlawfully deprived of a fundamentally important right that will harm them the rest of their lives.

*Holding & disposition.*

The Court held as follows:

A Texas statute which withholds from local school districts any state funds for the education of children who were not “legally admitted” into the United States, and which authorizes local school districts to deny enrollment to such children, violates the Equal Protection Clause of the Fourteenth Amendment. (p. 202)

*Court’s rationale.*

Justice Brennan, joined by Justices Marshall, Blackmun, Powell, and Stevens, delivered the Court's 5-4 decision. Unlike the majority opinion in *San Antonio Independent School District v. Rodriguez*, the Court examined the thoughts and statements of the framers of the Fourteenth Amendment in helping the Court reach a constitutional determination regarding a state classification scheme. And, the Court did utilize the type of scrutiny procedures suggested by Justice Marshall in his dissenting opinion in the *San Antonio* case. In the period intervening between *San Antonio* and the current case, Justices Blackmun and Powell may have re-thought Justice Marshall's remarks regarding the type of equal protection judicial scrutiny to be applied to state classification schemes as they voted this time to critically analyze such a scheme. Also, the Court utilized abundant case law in making its determination. Finally, the Court did not use any smoke screens of state actions to address inequity or rationalize a rational basis by noting the existence of such a practice in every other state in order to avoid hard, critical legal analysis.

The application of case law to the question regarding access to the Equal Protection Clause by illegal aliens proved more than sufficient to nullify state arguments regarding their ineligibility. That, and the examination of congressional debate surrounding the development of the Fourteenth Amendment were sufficient for the Court to observe:

To permit a State to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction, *thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons*, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. (Emphasis added) (p. 213)

Pointing out the obvious, the Court noted:

Use of the phrase "within its jurisdiction" thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who *is* subject to the

laws of a State, and reaches into every corner of a State's territory. That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. (Emphasis in original) (p. 215)

Presenting its holding regarding the first question, the Court announced:

And until he leaves the jurisdiction – either voluntarily, or involuntarily in accordance with the Constitution and the laws of the United States – he is entitled to the equal protection of the laws that a State may choose to establish. (p. 215)

The second question, the Court acknowledged, posed greater difficulty as it involved a determination of whether the Texas statute denying public education to children who couldn't "demonstrate that their presence within the United States is lawful" or couldn't bear "the burden of tuition" in lieu of such demonstration (pp. 215-216). Following the process articulated by Justice Marshall in his *San Antonio* dissent, Justice Brennan observed that the rational basis scrutiny was too "deferential a standard" to apply "to every classification" (p. 216). The Court articulated the first step, examining the Constitution:

In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein. But we have also recognized the fundamentality of participation in state "elections on an equal basis with other citizens in the jurisdiction," ... even though "the right to vote, per se, is not a constitutionally protected right." (p. 217, n. 15)

For the second step, the Court turned "to a consideration of the standard appropriate for the evaluation of §21.031," the Texas statute in question (p. 218). Examining the nature of the problem the law was supposed to address, the Court noted that

[s]heer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants – numbering in the millions – within our borders. (p. 218)

Noting that the plaintiff children were members of the underclass described, the Court observed that “the children who are plaintiffs in these cases ‘can affect neither their parents’ conduct nor their own status’” (p. 220). Weighing this circumstance and the effect of the state law against the concept of justice, the Court found something lacking as it observed, “[L]egislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice” (p. 220). The Court was unable to find a rational basis for the Texas law:

Of course, undocumented status is not irrelevant to any proper legislative goal.... But §21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of §21.031. (p. 220)

The Court then moved to an examination of the status of education, again using the process suggested by Justice Marshall in his *San Antonio* dissent. Noting that on the one hand, education is not a “‘right’ granted to individuals by the Constitution,” nor on the other hand “is it merely some governmental ‘benefit indistinguishable from other forms of social welfare legislation,” the Court began determining its benefit to society in order to place it on a scale between an explicit constitutional right and a mere benefit. The Court noted accordingly, “Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction” (p. 221). While perhaps not a fundamental right, “[E]ducation has a fundamental role in maintaining the fabric of our society” (p. 221). Furthermore, the Court declared,

[the] denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. (pp. 221-222)



Weighing the loss of an activity against the cost to individuals and society in order to determine the level of judicial scrutiny required in evaluating state legislation against the Equal Protection Clause, again following the pathway suggested previously by Justice Marshall, the Court reasoned as follows:

The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause. (p. 222)

At this point, the Court cited in their entirety the *Brown* decisions observations regarding education. Following this, the Court stated it was ready to “determine the proper level of deference to be afforded §21.031” (p. 223). In fact, the Court had already been engaged in that process through its adoption of the procedures recommended by Justice Marshall in his dissenting opinion in *San Antonio v. Rodriguez*. What the Court actually did at this point was announce that it would “appropriately take into account its [the discriminations of the Texas law] costs to the Nation and to the innocent children who are its victims” (p. 224). Observing that “more is involved in these cases” than questions requiring only a rational basis, after noting that a strict scrutiny analysis (requiring that a compelling state interest be shown as justification for the law) wasn’t necessary because education was not “a fundamental right,” the Court began the process of determining the level of scrutiny to be applied to the Texas law (p. 223). What emerged was a heightened form of scrutiny to determine whether the legislation’s ends aligned with the articulated purposes.

Regarding the state’s argument that the law was designed to protect the state “from an influx of illegal immigrants,” the Court observed that the primary motivation for illegal entry into this country was “the availability of employment” (p. 228). Evaluating the state’s argument,

the Court declared: “[W]e think it clear that ‘[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration,’ at least when compared with the alternative of prohibiting the employment of illegal aliens” (pp. 228-229).

Regarding the state’s argument that the burden of educating undocumented children would damage the state’s ability “to provide high-quality public education,” the Court pointed out that “the record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State” (p. 229). This observation also aligned with the findings of the Federal District Court for the Eastern District of Texas.

Finally, the Court addressed the state’s argument that the classification scheme was appropriate “because their [undocumented children] unlawful presence within the United States renders them less likely than other children to remain” in Texas, thus eliminating the possibility they would “put their education to productive social or political use with the State” (pp. 229-230). Questioning whether such an interest by Texas was legitimate, the Court pointed out that Texas “has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State’s borders” (p. 230). Pointing to the costs of the law, the Court questioned what in fact the state hoped to achieve.

It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a sub-class of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. (p. 230)

Whatever the interests of the State of Texas were in enacting §21.031, those purposes were “wholly insubstantial in light of the costs involved to these children, the State, and the Nation” (p. 231).

Announcing its holding in the context of a heightened judicial scrutiny that flowed from the suggestions offered by Justice Marshall in his dissenting opinion in *San Antonio Independent School District v. Rodriguez*, the Court ruled:

If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here. Accordingly, the judgment of the Court of Appeals in each of these cases is *Affirmed*. (Emphasis in original) (p. 230)

*Concurring/dissenting opinions.*

Concurring opinions were filed separately by Justices Marshall, Blackmun, and Powell. A single dissenting opinion was written by Chief Justice Burger, which was joined by Justices White, Rehnquist, and O'Connor. They shed no new light on the subject, nor do they break new ground.

**The due process clause.**

***Barron v. Baltimore, 32 U.S. 243 (1833).***

*Facts & procedural history.*

The city of Baltimore diverted streams of water flowing into the city harbor from “their accustomed and natural course,” the effect of which was to render useless the wharf (because of the ensuing shallowness of the harbor in which the wharf was located) owned by John Barron upon which he based his economic livelihood. He sued for damages and the loss of uncompensated property (the economic value of his wharf that had been rendered useless by the city’s action). The “Baltimore county court” found “against the defendants, and a verdict for four thousand five hundred dollars was rendered for the plaintiff” (p. 244). The City of Baltimore appealed to the “court of appeals for the western shore of the state of Maryland,” which reversed the lower court’s ruling “and did not remand the case to that court for a further

trial” (pp. 243, 244). Whereupon Barron filed for “a writ of error” to the U.S. Supreme Court (p. 244).

*Legal question.*

Does the Fifth Amendment act to restrain states and their political subdivisions from taking private property “for public use without just compensation” (p. 243)?

*Legal reasoning of opposing parties.*

Arguing that “the right and profit of wharfage, and use of the water at the wharf for the objects of navigation, was a vested interest” that had been “interfered with ... and taken away ... for public use” by the City of Baltimore, the attorney for John Barron argued that the Fifth Amendment required the city to reimburse Barron for his economic loss (p. 245). Citing the appropriate text of the Fifth Amendment, “private property shall not be taken for public use without just compensation,” Barron’s attorney argued that the Fifth Amendment

declares principles which regulate the legislation of the states, for the protection of the people in each and all the states regarded as citizens of the United States, or as inhabitants subject to the laws of the union. (p. 246)

Roger B. Taney was currently serving as the Attorney General of the United States. He also appeared to be representing the City of Baltimore as well. According to the following note, the attorneys for the City of Baltimore did not make argument before Chief Justice Marshall’s Court: “The counsel for the defendants in error [sic] Mr. Taney and Mr. Scott, were stopped by the court” (p. 247, asterisked note).

*Holding & disposition.*

The U. S. Supreme Court held that the Fifth Amendment acted only to restrain the federal government from infringing personal liberties, not the state governments. Being applicable only

to the federal government and not the individual state governments, the Court had “no jurisdiction of the cause” and thus dismissed the case (p. 249).

*Court’s rationale.*

Chief Justice Marshall announced the unanimous 7-0 verdict of the Court. He began by observing, “The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states” (p. 247). The Chief Justice continued:

The people of the United States framed such a government for the United States... The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. (p. 247)

Chief Justice then drew the obvious conclusion from the previous propositions, framing his deduction in a manner that included the fact of state constitutions:

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. (p. 247)

After beginning the Court’s review by focusing upon the text of the Constitution, particularly Article I, § 9 & § 10, the Chief Justice concluded:

Had congress [sic] engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language. (p. 249)

Continuing the Court’s analysis of the Constitution, Chief Justice Marshall next noted that most of the state conventions called to ratify the newly proposed Constitution recommended that amendments be adopted “to guard against [an] abuse of power” and to provide “security against

the apprehended encroachments of the general government – not against those of the local governments” (p. 249). Observing that Congress subsequently proposed such amendments which were duly “adopted by the states,” Chief Justice Marshall concluded:

These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them. We are of opinion that the provision in the fifth amendment ... declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. (p. 249)

Therefore, Chief Justice Marshall continued, “[T]here is no repugnancy between the several acts ... of Maryland,... and the constitution [sic] of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed” (p. 249).

The significance of *Barron v. Baltimore* lies in the fact that it’s ruling regarding the inapplicability of the Bill of Rights as a restraint on state power held sway well into the Twentieth Century, even after the passage of the Fourteenth Amendment. This was particularly so regarding the Fifth Amendment’s clauses pertaining to the rights of accused persons. Since these rights are numerous, and since the Fifth Amendment contains many clauses, the full text of the Fifth Amendment to the Constitution follows:

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In *Hurtado v. California*, 110 U.S. 516 (1884), the Court rejected argument that attempted to apply “the Fifth Amendment requirement of grand jury indictment in ... capital cases” by way of the Due Process Clause of the Fourteenth Amendment (Hall, 1992, p. 418).

Justice Harlan's dissent in *Hurtado v. California* would subsequently be used for legal argument in *Palko v. Connecticut*, 302 U.S. 319 (1937), unfortunately, in vain. The legal issue in *Palko* involved double jeopardy. In his dissenting opinion in *Hurtado*, Justice John Marshall Harlan declared "that whatever would be a violation of the original Bill of Rights if done by the federal government was equally unlawful under the Fourteenth Amendment if done by the states" (Hall, 1992, p. 618). The thread of Justice Harlan's dissent would again find resonance with Justice Hugo Black, who articulated the argument first presented by Harlan. In *Adamson v. California*, 332 U.S. 46 (1947), a case involving an asserted right against self-incrimination based on the Fifth Amendment, Justice Black's dissenting opinion declared

that the due process clause should be read to guarantee that "no state could deprive its citizens of the privileges and protections of the Bill of Rights" and therefore argued that the Fourteenth Amendment incorporates "the full protection of the Fifth Amendment's provision against compelling evidence from an accused to convict him of a crime." (Hall, 1992, p. 9)

The Court has never fully adopted the approach first articulated by Justice Harlan nor its more recent iteration by Justice Black. The Court "has, however, incorporated many of the individual components of the Bill of Rights under a doctrine called 'selective incorporation'" (Hall, 1992, p. 9). The rationale for selective incorporation was most clearly articulated by Justice Cardozo in *Palko v. Connecticut*, a case which will be subsequently examined. While the Fifth Amendment rights of the accused were quite slow in being applied, if at all, as restrictions on state action, property rights, the subject matter of the last clause of the Fifth Amendment, fared much better. In fact, this Fifth Amendment clause was the first to be incorporated by reason of the Fourteenth Amendment as a restriction on state activity in *Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897), a 7-1 Court decision that was authored by Justice Harlan.

*Concurring/dissenting opinions.*

Being a unanimous decision by Justices Johnson, Duvall, Story, Thompson, M'Lean, Baldwin, and Chief Justice John Marshall, the question of dissenting opinions was rendered moot. During the period in question, it was not customary to offer separate concurring opinions.

***Palko v. Connecticut, 302 U.S. 319 (1937).***

*Facts & procedural history.*

Palko was indicted for murder in the first degree in state court in Fairfield County, Connecticut, but the jury convicted Palko of murder in the second degree whereupon he was sentenced to life imprisonment. Connecticut law, with the presiding judge's permission, permits "appeals in criminal cases to be taken by the state" to the Supreme Court of Appeals (p. 320). Upon such appeal by the State of Connecticut, "the Supreme Court of Errors reversed the judgment and ordered a new trial" as a result of its findings (p. 321):

It found that there had been error of law to the prejudice of the state (1) in excluding testimony as to a confession by defendant; (2) in excluding testimony upon cross-examination of defendant to impeach his credibility, and (3) in the instructions to the jury as to the difference between first and second degree murder. (p. 321)

Upon retrial, and prior to the jury being impaneled, Palko objected to the court that he was being placed "twice in jeopardy for the same offense," which was in violation "of the Fourteenth Amendment of the Constitution of the United States" (p. 321). The court overruled his objection and the new trial continued with the jury returning a verdict in the second trial of "murder in the first degree" (p. 321). As punishment, the court sentenced Palko to the death penalty. Upon appeal, the "Supreme Court of Errors affirmed the judgment of conviction" (p. 322). Whereupon, Palko appealed to the U.S. Supreme Court which agreed to hear his case.

*Legal question.*



Is the prohibition of double jeopardy by the Federal Government in the Fifth Amendment made “applicable against state action by force of the Fourteenth Amendment” (p. 319)? “Is double jeopardy ... a denial of due process forbidden to the states” by the Fourteenth Amendment (p. 323)?

*Legal reasoning of opposing parties.*

Palko’s attorneys argued that “whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also” (p. 322). The Court further summarized the arguments presented by the two attorneys arguing on Palko’s behalf:

To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the people of a State. (p. 322)

The Court’s opinion provided additional information regarding the arguments made by Palko’s attorneys, this one being most similar to the argument made by Justice Harlan in his dissenting opinion in *Hurtado v. California*, 110 U.S. 516 (1884):

We have said that in appellant’s view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. (p. 323)

Neither the materials reported by the Court nor the Court’s opinion revealed any information about the arguments presented by the two attorneys representing the State of Connecticut. However, some of their arguments may be deduced from a reading of the Court’s opinion. One would also imagine that Connecticut’s attorneys would have cited the Court’s ruling in *Hurtado v. California* whereby the Court held “that the Due Process Clause of the Fourteenth Amendment could not logically encompass the specific procedural guarantees of the

Fifth Amendment,” particularly since it was a case cited by the Court in its ruling (Hall, 1992, p. 418; p. 323).

*Holding & disposition.*

Regarding the first question, the Court held that the “Fourteenth Amendment does not guarantee against state action all that would be a violation of the original bill of rights ... if done by the Federal Government” (p. 320). Regarding the second question, the Court’s answered in the following manner:

The conviction of the defendant upon the retrial ordered upon the appeal by the State in this case was not in derogation of any privileges or immunities that belonged to him as a citizen of the United States. (p. 320)

*Court’s rationale.*

Justice Cardozo wrote the Court’s 8-1 decision. It must have been one of Cardozo’s last opinions because he didn’t participate in further cases beginning December 10, 1937, “on account of illness,” which was just four days after the decision in *Palko* was announced (302 U.S. III). Regarding the argument that the Fourteenth Amendment applied the first eight amendments of the Bill of Rights against the state governments and officials, Justice Cardozo stated, “There is no such general rule” (p. 323). Regarding the Fifth Amendment, Justice Cardozo observed the Court’s holding in *Hurtado v. California* and *Gaines v. Washington* that the grand jury requirement could be replaced by the state in the form of “informations at the instance of a public officer” (p. 323). Regarding the Fifth Amendment’s prohibition against self-incrimination, Justice Cardozo pointed to the holdings in *Twining v. New Jersey*, *Snyder v. Massachusetts*, and *Brown v. Mississippi* whereby the Court held “that in prosecutions by a state, the exemption will fail if the state elects to end it” (p. 324). Regarding both the Sixth and

Seventh Amendments' requirements for jury trial, Justice Cardozo pointed to multiple rulings which held "trial by jury may be modified by a state or abolished altogether" (p. 324).

However, as Justice Cardozo pointed out, there have been portions of the Bill of Rights that have been applied against the state governments by the Fourteenth Amendment's Due Process Clause, particularly with reference to the First Amendment's guarantees. Justice Cardozo explained, citing specific provisions of the Bill of Rights and the corresponding cases whereby the Court had applied them as a restriction against the states:

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress, ... or the like freedom of the press, ... or the free exercise of religion, ... or the right of peaceable assembly, without which speech would be unduly trammelled, ... or the [Sixth Amendment's] right of one accused of crime to the benefit of counsel... (p. 324)

According to Justice Cardozo's reasoning, the previously mentioned portions of the Bill of Rights, or "immunities ... have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states" (pp. 324-325). In other words, the individual rights which both the federal and state governments have to respect are fundamental to American notions of justice and liberty. Justice Cardozo articulated the "rationalizing principle" whereby certain rights were held to be inviolate and protected from infringement by any type of government, be it state or federal: these certain rights are "of the very essence of a scheme of ordered liberty," with each such protected right representing a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (p. 325). By contrast, while having value, "the right to trial by jury and the immunity from prosecution except as the result of an indictment ... are not of the very essence of a scheme of ordered liberty" (p. 325). Justice Cardozo continued: "What is true of jury trials

and indictments is true also ... of the immunity from compulsory self-incrimination.... This too might be lost, and justice still be done” (p. 325).

Having described rights that had been recognized as being inviolable by any level of American government, having articulated the organizing principle whereby the Court determined which rights were inviolable by any government and those rights that were protected only against infringement by the federal government, and having illustrated the rights protected only from federal infringement, Justice Cardozo further explained the Court’s reasoning used to differentiate which rights were absorbed by the Fourteenth Amendment and those rights which were not absorbed.

The exclusion of these immunities and privileges [i.e., trial by jury, indictment by a grand jury, etc.] from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself. (p. 326)

Justice Cardozo expounded further with reference to the process of “absorption” and its true source:

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. (p. 326)

Having laid out the “dividing line” and its “unifying principle,” Justice Cardozo moved to the question of “on which side of the line the case made out by the appellant [Palko] has appropriate location” (p. 328). Justice Cardozo asked:

Is that kind of double jeopardy to which the statute has subjected him [Palko] a hardship so acute and shocking that our polity will not endure it? Does it violate those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions”? [sic] (p. 328)

Answering, “no,” Justice Cardozo further explained:

The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error.... There is no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before. (p. 328)

Prior to pronouncing that the judgment of the lower court was affirmed, Justice Cardozo announced the Court’s holding, “The conviction of appellant [Palko] is not in derogation of any privileges or immunities that belong to him as a citizen of the United States” (p. 328).

As noted by one legal scholar, *Palko* constituted a watershed event regarding the Fourteenth Amendment’s Due Process Clause:

*Palko* represents the beginning of a struggle to find a test for applying the Due Process Clause of the Fourteenth Amendment as a limit on state power.... Cardozo’s opinion was a precursor of the “incorporation debate” that became so evident later in *Adamson v. California* (1947). His rationale for upholding the Connecticut law developed into the “fundamental fairness” test later championed by Justice Felix Frankfurter, while the theory he rejected became known as the incorporation doctrine favored by Justice Hugo Black. (Hall, 1992, p. 618)

Continuing, the legal scholar described the resolution reached by the Court post-*Palko*:

A variation of the incorporation doctrine won out, as many of the protections of the Bill of Rights eventually were applied directly to the states. In 1969 *Palko* was overruled by *Benton v. Maryland*, and double jeopardy became one of those provisions of the Bill of Rights selectively incorporated into the Fourteenth Amendment. (Hall, 1992, p. 618)

*Concurring/dissenting opinions.*

Justice Butler dissented from the eight-member majority, but offered no opinion nor explanation as to his reasons for dissenting.

**The application of other restrictions on state action under the fourteenth amendment.**

*Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).*

*Case summary.*

The subject matter involved gender-based discrimination against male employees by the State of Connecticut's "statutory retirement benefit plan," an action prohibited ultimately by the Fourteenth Amendment and more immediately by Title VII of the Civil Rights Act of 1964, which was passed under the authority of § 5 of the Fourteenth Amendment (p. 445). Although Title VII of the Civil Rights Act of 1964 did not originally include "the States as employers," it was amended to do so by the 1972 Amendments to Title VII of the Civil Rights Act of 1964 (p. 445).

The legal issue involved a conflict between the Eleventh and Fourteenth Amendments. The legal question posed by the case as articulated by the High Court: Does "the shield of sovereign immunity [offered] the State by the Eleventh Amendment" protect the State against the congressional power of enacting laws and awards "against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment" (p. 448)?

Procedurally the initial action began in the U.S. District Court for the District of Connecticut, was appealed to the U.S. Court of Appeals for the Second Circuit, and ended up before the U.S. Supreme Court. The initial action was filed by "[p]resent and retired male employees of the State of Connecticut" and alleged

that certain provisions of the State's statutory retirement benefit plan discriminated against them because of their sex, in violation of Title VII of the Civil Rights Act of 1964, which, as amended, extends coverage to the States as employers. (p. 445)

Defendants named by the lawsuit included Bitzer, "the Chairman of the State Employees' Retirement Commission," as well as both "the Treasurer and the Comptroller of the State of Connecticut" (p. 449, n. 4). The District Court "held that the Connecticut State Employees Retirement Act violated Title VII's prohibition against sex-based employment discrimination"

and “entered prospective injunctive relief in petitioners’ favor against respondent state officials”

(p. 449). In its review of the facts of the case, the Supreme Court also noted the following:

Petitioners had also alleged that the retirement plan was contrary to the Equal Protection Clause of the Fourteenth Amendment, but in view of its ruling under Title VII the District Court found no reason to address the constitutional claim. 390 F. Supp., at 290. (p. 449, n. 3)

Regarding the remaining allegations of the state employees, the District Court did not grant the petitioners’ claim for “an award of retroactive retirement benefits as compensation for losses caused by the State’s discrimination, as well as ‘a reasonable attorney’s fee as part of the costs’”

(pp. 449-450). The District Court reasoned that

both [claims by petitioners] would constitute recovery of money damages from the State’s treasury, and were therefore precluded by the Eleventh Amendment and by this court’s [the U.S. Supreme Court] decision in *Edelman v. Jordan*, [415 U.S. 651 (1974)]. (p. 450)

The appeal of the District Court’s decision to the U.S. Court of Appeals for the Second Circuit was not made by the State of Connecticut, but instead by the original plaintiffs in the case. The state employees contended “that Congress does possess the constitutional power under § 5 of the Fourteenth Amendment to authorize their Title VII damages action against the State” (p. 451). In its ruling the Court of Appeals affirmed part of the District Court’s ruling and reversed part of the same court’s holding regarding damages and attorneys’ fees. Since the appeal centered only on those aspects (damages and attorneys’ fees) of the case and not upon the District Court’s ruling regarding the finding of discrimination on the part of the State nor the ensuing injunction against Connecticut officials – those constituted ground in the appeal process, not figure in Gestalt terminology – the Court of Appeals addressed only the issue of damages, i.e., backpay, and attorneys’ fees. The Court of Appeals agreed with the District Court’s finding regarding damages, but disagreed regarding attorney fees. Reasoning that attorneys’ fees “would

have only an ‘ancillary effect’ on the state treasury of the kind permitted under *Edelman*,” the Court of Appeals remanded the issue of attorneys’ fees to the District Court (p. 451).

The state employees filed an appeal of the Circuit Court’s ruling regarding the issue of backpay, i.e., “an award of retroactive retirement benefits as compensation for losses caused by the State’s discrimination” (pp. 449-450). Whereupon the Connecticut state officials cross-filed, accepting the Court of Appeals affirmation that damages were precluded by the Eleventh Amendment, but arguing “that under *Edelman* the Eleventh Amendment bars any award of attorneys’ fees here because it would be paid out of the state treasury” (p. 451). The petition of the state officials was designated “No. 75-283, *Bitzer, Chairman, State Employees’ Retirement Commission, et al. v. Matthews et al.* (p. 445, asterisked note).

Justice Rehnquist delivered the unanimous Court ruling in *Fitzpatrick v. Butler*. The 9-0 Court opinion began the process of distinguishing the *Edelman* decision from the current case. According to Justice Rehnquist:

In *Edelman* this Court held that monetary relief awarded by the District Court to welfare plaintiffs, by reason of wrongful denial of benefits ... violated the Eleventh Amendment. Such an award was found to be indistinguishable from a monetary award against the State itself...” (p. 451).

Providing addition elaboration, Justice Rehnquist explained, “We concluded that none of the statutes relied upon by plaintiffs in *Edelman* contained any authorization by Congress to join a State as a defendant” (p. 452). The Court further noted:

All parties in the instant litigation agree ... that the suit for retroactive benefits ... is in fact indistinguishable from that sought ... in *Edelman*, since what is sought here is a damages award payable to a private party from the state treasury. (p. 452)

“Our analysis begins where *Edelman* ended, for in this Title VII case, the ‘threshold fact of congressional authorization’ ... to sue the State as employer is clearly present,” announced



Justice Rehnquist (p. 452). Continuing, he pointed out the nature of the legal question involved in the current case: “[H]ere, however, the Eleventh Amendment defense is asserted in the context of legislation passed pursuant to Congress’ authority under § 5 of the Fourteenth Amendment” (p. 453). Justice Rehnquist next engaged in a judicial lecture focused on the intent of the Fourteenth Amendment to limit state sovereignty.

As ratified by the States after the Civil War, that Amendment quite clearly contemplates limitations on their authority.... The substantive provisions are by express terms directed at the States. Impressed upon them by these provisions are duties with respect to their treatment of private individuals. Standing behind the imperatives is Congress’ power to “enforce” them “by appropriate legislation.” (p. 453)

Citing *Ex parte Virginia*, Justice Rehnquist noted that the Court in that case “examined at length” the “impact of the Fourteenth Amendment upon the relationship between the Federal Government and the States” and scrutinized as well “the reach of congressional power under § 5” (p. 453). Finding the discussion in that case pertinent to the current legal discussion, Justice Rehnquist quoted several observations from *Ex parte Virginia*, 100 U.S. 339 (1880):

The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, ... whether that action be executive, legislative, or judicial. (p. 454)

Justice Rehnquist then cited a specific example of the Fourteenth Amendment’s impact upon state action from *Ex parte Virginia*:

It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. (p. 454)

Justice Rehnquist’s next selection from *Ex parte Virginia* focused on the importance of § 5 of the Fourteenth Amendment for interpreting that Amendment’s reach:

Were it not for the fifth section of that amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State.... But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete. *Id.*, at 346-348. (p. 455)

Based upon its examination, the Court moved to announce a basic finding that would control its holdings in the case.

It is true that none of these previous cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under § 5 of the Fourteenth Amendment. But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana*, 134 U.S. 1, (1890), are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. (p. 456)

Justice Rehnquist continued to explain the Court's basic finding in terms of its difference from other activities covered by the Eleventh Amendment.

We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. (p. 456)

Thus, the Court affirmed the Court of Appeals' judgment to allow the state employees to recover attorney fees, and at the same time the Supreme Court reversed the Court of Appeals' decision to prohibit the state employees from being awarded backpay for losses suffered by the State of Connecticut's discriminatory action.

*Significance for the fourteenth amendment.*

*Fitzpatrick v. Bitzer*'s significance for the Fourteenth Amendment is two-fold. First, it demonstrates that in subject matters involving discrimination covered by the Fourteenth Amendment, that Amendment overrides any Eleventh Amendment concerns. The Fourteenth Amendment provides a limitation upon state activity, period. Second, the case serves as a

reminder that the Amendment's power lies in its restrictions upon state, not upon federal, activity in the federal scheme of balancing power between the states and the national government.

***Brown v. Hartlage, 456 U.S. 45 (1982).***

*Case summary.*

*Brown v. Hartlage* involved the application of the First Amendment to state legislation via the Fourteenth Amendment. The subject matter featured a collision between an election for the position of Jefferson County Commissioner involving an incumbent and a challenger, Kentucky legislation regarding speech during an election campaign, and speech uttered by Brown as a candidate for Hartlage's position during the course of the campaign.

Regarding the facts of the case, § 121.055 of the Corrupt Practices Act enacted in 1982 to form a portion of the Kentucky State Code, specified the following:

No candidate for nomination or election to any state, county, city or district office ... shall promise, agree or make a contract with any person to vote for or support any particular individual, thing, or measure, in consideration for the vote ... of that person in any election... (p. 49)

The act further specified that any judicially determined violations of the Corrupt Practices Act by a successful candidate would result in "the nomination or election of the contestee [being] declared void" (p. 49, n. 4, as continued on p. 50). During the course of the campaign for the position of Jefferson County Commissioner from District C, Carl Brown as a challenger to the incumbent Earl Hartlage, "charged his opponent with complicity in a form of fiscal abuse," that of leading "a surprise move to ... more than double the salaries of the county commissioners" (p. 47)! Brown and a fellow candidate for Jefferson County Commissioner representing District B, Bill Creech, "pledged the tax payers [of Jefferson County] some relief" by declaring that "one of our first official acts as county commissioners will be to lower our salary to a more realistic level..." (p. 48). After the televised news conference ended, "Brown and Creech learned that

their commitment to lower their salaries arguably violated the Kentucky Corrupt Practices Act” (p. 48). Four days after the press conference, both candidates “issued a joint statement retracting their earlier pledge” in which they stated:

We have discovered that there are Kentucky court decisions and Attorney General opinions which indicate that our pledge to reduce our salaries if elected may be illegal.... [W]e do hereby formally rescind our pledge to reduce the County Commissioners’ salary if elected and instead pledge to seek corrective legislation in the next session of the General Assembly, to correct this silly provision of State Law. (pp. 48-49)

The results of the election triggered the procedural events of *Brown v. Hartlage*. In the ensuing election, “Brown defeated Hartlage by 10,151 votes. Creech was defeated” (p. 49). Immediately Earl Hartlage filed a lawsuit “in the Jefferson Circuit Court,” *Hartlage v. Brown*, charging that “Brown had violated the Corrupt Practices Act and seeking to have the election declared void and the office of Jefferson County Commissioner, ‘C’ District, vacated by Brown” (p. 49). The “trial court found that ... Brown’s promise violated the Act,” but further

concluded that in light of Brown’s retraction, the defeat of his running mate, who had joined in the pledge, and the presumption that the will of the people had been revealed through the election process, Brown had been “fairly elected.” (p. 50)

The Jefferson Circuit Court, the initial trial court of the action, “declined to order a new election” as a result of its reasoning of the case.

Upon appeal by Hartlage, the Kentucky Court of Appeals reversed the lower state court’s decision. The Kentucky Court of Appeals, while agreeing “that Brown’s statement was proscribed” by the Kentucky Corrupt Practices Act, “also held, however, that the trial court had erred in failing to order a new election” and “was mistaken in believing that it possessed the discretionary authority to balance the gravity of the violation against the disenfranchisement of the electorate that would result from declaring the election void” (pp. 50, 51). Regarding

Brown's claim that the Kentucky law violated his speech rights as guaranteed by the First Amendment which were subsequently applied as a restraint on state action against freedom of speech by way of the Fourteenth Amendment, the Kentucky Court of Appeals "concluded that Brown's 'statement was not constitutionally protected'" by virtue of the following reasoning:

To hold that promises to serve at reduced compensation in violation of the Corrupt Practices Act are immune from regulation in view of the provisions of the United States Constitution is to open the door to arguments that other statements in violation of the Corrupt Practices Act are protected because they involve speech and self-expression. (p. 51)

Finding "that the State's interest in the fairness and integrity of its elections was compelling, and that the State could insist that elections be conducted free of corruption and bribery," the Kentucky Court of Appeals voided the election results, thereby reversing the initial decision of the trial court (pp. 51-52).

Upon appeal by Brown, the "Supreme Court of Kentucky denied review, whereupon Brown appealed to the U.S. Supreme Court, which "granted the petition for certiorari" (p. 52).

Justice Brennan delivered the Court's decision, a unanimous 9-0 ruling, in *Brown v. Hartlage*. The first sentence of the opinion acknowledged "that the States have a legitimate interest in preserving the integrity of their electoral processes" (p. 52). However:

When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one,,, (pp. 53-54)

Noting that a candidate's promise to confer some ultimate benefit on the voter ... does not lie beyond the pale of First Amendment protection" (pp. 58-59), Justice Brennan pointed to a bedrock principle of the First Amendment:

[T]he State ban runs directly contrary to the fundamental premises underlying the First Amendment as the guardian of our democracy. That Amendment embodies our trust in the free exchange of ideas as the means

by which the people are to choose between good ideas and bad, and between candidates for political office. (p. 60)

Justice Brennan particularly highlighted a statement made by Justice Brandeis. According to Justice Brennan, “The preferred First Amendment remedy of ‘more speech, not enforced silence,’ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), thus has special force” (p. 61). Announcing its holding, the unanimous Court declared:

Because we conclude that § 121.055 has been applied in this use to limit speech in violation of the First Amendment, we reverse the judgment of the Kentucky Court of Appeals and remand for proceedings not inconsistent with this opinion. (p. 62)

*Significance for the fourteenth amendment.*

*Brown v. Hartlage* reaffirmed the incorporation doctrine whereby restrictions on infringements of basic constitutional rights (the Bill of Rights having prohibited such action by the federal government) were applied to state government activity through the agency of the Fourteenth Amendment. In this case, the First Amendment was applied to negate state legislation violating the speech guarantee of that Amendment by use of the Fourteenth Amendment. Once again, this case illustrates the use of the Fourteenth Amendment to restrain state action against the rights of individuals. It also illustrates the intertwining of the Fourteenth Amendment with the idea of republican government contained in Article IV, § 4 of the U.S. Constitution.

### **Summary of Salient Points**

The Guarantee Clause and the Fourteenth Amendment are joined hip-and-thigh. Many (including this writer) do not understand that basic fact until they become familiar with the historical underpinnings of the Fourteenth Amendment. The Guarantee Clause was invoked by President Lincoln as the basis for the federal government’s involvement in the Civil War. The

Guarantee Clause provided the constitutional grounding for the congressional reconstruction of the South, out of which emerged the constitutional amendments collectively known as the Reconstruction Amendments. One legal scholar provided a description of both their context and their impact:

Four score years after the Founding, a new generation arose to transform what their fathers had brought forth on the continent. In what can only be described as a constitutional revolution, the nation ended slavery, made every person born under the flag an equal citizen, guaranteed a host of civil rights to all Americans, and extended equal political rights to black men. (Amar, 2005, p. 351)

Finally, it should be recognized that the Guarantee Clause was specifically invoked on the floor of Congress to justify the framing of the Fourteenth Amendment.

Two developments conjoined to support the trio of amendments, of which the Fourteenth constituted the centerpiece of subsequent case law emerging from all three amendments. First, historical development subsequent to the framing and ratification of the Constitution had revealed that state governments were just as likely as the federal government to violate critical individual rights that form the critically necessary background of a republican form of government. Second, it was recognized that something of constitutional significance was needed to guarantee the basic rights of the newly freed slaves in the southern states. Hence, the Fourteenth Amendment arose out of the northern effort to “reconstruct” the South on a more republican basis in the aftermath of the Civil War. Despite the inherent promise, the reality of its implementation would require adaptive work before being implemented. Continuing his discussion of the “constitutional revolution” wrought by passage of the Reconstruction Amendments, Professor Akhil Reed Amar noted:

Hard as it was to get America to make these promises, getting her to keep them would prove harder still. Full compliance would not occur until a Second Reconstruction in the late twentieth century. For women, too, the

First Reconstruction would taste bittersweet, as daughters of the republic won promises of civil rights but not the key political right to vote. (Amar, 2005, p. 351)

Understanding the historical background of the Fourteenth Amendment as growing out of the Guarantee Clause of the Constitution also helps the modern-day reader of Supreme Court decisions understand why both the Guarantee Clause and the Fourteenth Amendment were jointly used as constitutional underpinnings of legal argument in the newly emerging jurisprudence of the Fourteenth Amendment. Without understanding the historical connection between the Guarantee Clause and the Fourteenth Amendment, the conjunction of both in early Fourteenth Amendment case law appears to be only an odd coincidence that makes sense since both are focused on basic human rights, without which a republican form of government is impossible.

While the Guarantee Clause has been deemed nonjusticiable, primarily because of the lack of discernable standards by which a Court can make a determination of what constitutes a republican form of government and what does not, the Fourteenth Amendment has compiled a remarkable body of jurisprudence. Being a part of the three Civil War Amendments, the Fourteenth Amendment shares an important clause with them, the first of any constitutional amendments to contain such a clause. § 5 of the Fourteenth Amendment reads, “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article” (U.S. Constitution, Amendment XIV). The inclusion of that clause has been of critical importance in overriding the late-twentieth-century/early-twenty-first century developments of Eleventh Amendment jurisprudence initiated by the Rehnquist Court which implausibly have ruled that sovereign immunity enjoys full constitutional status capable of being overridden by only a few select constitutional provisions, § 5 of the Fourteenth Amendment being one of those (See



subsequent chapter, particularly the discussions of *Seminole Tribe of Florida v. Florida* and *Alden v. Maine*, as well as that chapter's summary).

From the perspective of legal history, the Fourteenth Amendment has been used to restrict the activities of state and local governments. It has never served as a bulwark to impede, inhibit, or restrict any federal government activities. No act of Congress has been struck down on the grounds that it violates provisions of the Fourteenth Amendment. Instead, the Fourteenth Amendment has centered on the preservation of individual liberties against incursion by state and local governments. As a result, state laws have been struck down, local government actions have been prohibited, and the activities of state and local government officials have been restrained judicially by the Fourteenth Amendment. Focused on preserving individual liberties deemed to be fundamental in nature, the Fourteenth Amendment has been used to hold certain basic liberties contained in the Bill of Rights as being inviolable of incursion by state and local governments. The Fourteenth Amendment provided the basis for striking down the Plessy doctrine of "Separate, But Equal" in the field of public education beginning with the Court's decision in *Brown v. Board of Education* (1954). As a result state laws segregating students because of race in public education were struck down. And even though the Court's opinion in *Brown* talked about the importance of education, eventually education was not deemed by the Court to represent a fundamental right.

Before continuing the discussion of *Brown*'s influence, it is important to keep in mind the various levels of judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment that have been fashioned by the Court to evaluate the constitutionality of governmental classifications that impinge on human rights. At the time the California Supreme Court ruled in *Serrano v. Priest*, two levels of judicial scrutiny existed – the rational basis test

and the strict scrutiny test. Both were described by that court. The tests conform to a hierarchy with fundamental, constitutionally protected rights at the top. Explaining the rational basis test, the California Supreme Court observed:

In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. (487 P.2d 1241, 1249)

Thus, with regard to most legislation, the Court begins with the assumption that the law is constitutional and seeks only to determine whether the law rationally connects to a legitimate government purpose with its classification scheme. The resulting classification schemes do not connect to “suspect classifications,” nor do they involve “fundamental interests” protected by the Constitution (487 P.2d 1241, 1249). The involvement of “suspect classifications” and/or “fundamental interests” require a higher level of judicial analysis, that of “strict scrutiny” (487 P.2d 1241, 1249). As explained by the California Supreme Court:

Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose. (Emphasis in original) (487 P.2d 1241, 1249)

An intermediate form of judicial scrutiny emerged using principles urged by Justice Thurgood Marshall in his dissenting opinion in *San Antonio Independent School District v. Rodriguez* (1973). We first encountered the standard of heightened scrutiny in *Plyler v. Doe* (1982) wherein Justice Brennan applied the method of constitutional analysis articulated by Justice Marshall. Heightened scrutiny “requires that governmental action be ‘substantially’ related to an ‘important governmental interest’” (Hall, 1992, p. 435). Heightened scrutiny would be used to evaluate the “denial of a particular right” that is not a constitutional right (either “explicitly or implicitly”), but which is related to the exercise of a fundamental right (457 U.S. 202, 217, n.

15). The denial of education (not a fundamental right protected by the Constitution, but a right necessary for the exercise of constitutionally-protected rights) to undocumented students in its public schools by the Texas legislature provided an example whereby heightened scrutiny was used to invalidate the Texas law.

The Court's dicta in *Brown v. Board of Education* (1954) regarding the importance of education became one of the most cited provisions of the Court's *Brown* opinion in subsequent court decisions in which education featured in the subject matter. Cited by state supreme courts, lower federal courts, and by the Supreme Court itself, the dicta in the original *Brown* decision merits a second look. In discussing education, the *Brown* Court declared:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. (347 U.S. 483, 493)

While later courts would emphasize the importance of education as a preparation for assuming the adult responsibilities of citizenship, they would also discuss education's vital role in preparing individuals for the life of work as a foundation for later success in life. According to the *Brown* Court:

Today, it [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (347 U.S. 483, 493)

The Warren Court's views regarding the importance of education served as the foundation upon which the Supreme Court of California would declare that education was indeed

a fundamental right which would require that a compelling state purpose would be needed to justify any classification scheme involving education. In *Serrano v. Priest* (1971), the California Supreme Court struck down a public school financing scheme on the grounds that it resulted in a school classification scheme “conditioned on wealth” (487 P.2d 1241, 1244). According to the Supreme Court of California’s ruling, “[T]he right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth” (487 P.2d 1241, 1244). Drawing upon the model provided by the *Brown* decision, the California Supreme Court explained why education constituted a fundamental right:

This [the indispensable role played by education in modern society] role, we believe, has two significant aspects: first, education is a major determinant of an individual’s chances for economic and social success in our competitive society; second, education is a unique influence on a child’s development as a citizen and his participation in political and community life. (487 P.2d 1241, 1255-1256)

The California High Court also identified the particular nexus between education and a specific duty of citizenship. According to the California Supreme Court:

The analogy between education and voting is much more direct: both are crucial to participation in, and the functioning of, a democracy. Voting has been regarded as a fundamental right because it is “preservative of other basic civil and political rights...,” (Reynolds v. Sims, *supra*, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed. 2d 506; see Yick Wo v. Hopkins (1886) 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220.). (487 P.2d 1241, 1258)

Nor was the California Supreme Court the only court viewing education as a fundamental right. School-finance systems in Minnesota, New Jersey, and Michigan were also struck down because the quality of a fundamental right, i.e., education, was conditioned upon wealth.

Of the cases examined, the United States District Court for the Western District of Texas became the next court to rule that education was a fundamental right. In *San Antonio Independent School District v. Rodriguez*, 337 F. Supp. 280 (1971), the federal district court

invalidated the Texas school financing scheme as violative of the Equal Protection Clause of the Fourteenth Amendment. According to the Supreme Court's summary of that decision, "The District Court [found] that wealth is a 'suspect' classification and that education is a 'fundamental' right" (411 U.S. 1).

The view of education as a fundamental right was specifically overturned by the U.S. Supreme Court in its narrow 5-4 ruling in *San Antonio Independent School District v. Rodriguez* (1973). Although education was important and played a "vital role" in "our democratic society," according to the Court's 5-4 majority, "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause" (411 U.S. 1, 30). "Education, of course," the Court declared, "is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected" (411 U.S. 1, 35). Four of the justices hearing the case argued, however, did believe that education constituted a fundamental right – Justices Brennan, White, Marshall, and Douglas. Justice Marshall's dissenting opinion articulated his vision of an intermediate level of scrutiny to be applied to rights vitally connected to the exercise of constitutionally-protected rights, but which were not in themselves explicitly-protected rights. The subsequent implementation of Justice Marshall's vision resulted in the addition of heightened scrutiny situated above rational basis scrutiny and below strict scrutiny.

Heightened scrutiny was used by the Court in *Plyler v. Doe* (1982), yet another 5-4 decision by the Court. Describing the role and importance of education, Justice Brennan's discussion implicitly recognized the inadequacy of having only two standards of judicial scrutiny, both of which were inappropriate in confronting education. According to Justice Brennan's majority opinion:

Public education is not a “right” granted to individuals by the Constitution. *San Antonio Independent School Dist. V. Rodriguez*, 411 U.S. 1, 35 (1973). But neither is it merely some governmental “benefit” indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. (457 U.S. 202, 221)

While perhaps not a fundamental right in the sense that public education is not mentioned in the Constitution, “[E]ducation has a fundamental role in maintaining the fabric of our society” (457 U.S. 202, 221). So, while not a *fundamental right* enjoying constitutional status, education plays a *fundamental role* in today’s society, a status that, when examined judicially, requires the use of the heightened scrutiny standard under the Equal Protection Clause of the Fourteenth Amendment.

However, it should be remembered, no federal legislation has been challenged on the basis of the Fourteenth Amendment. Centered on preserving basic constitutional rights from being violated by state and local governments, the Fourteenth Amendment has acted to abolish state legislation by reason of their unconstitutionality. Given this perspective, it is difficult for this writer to envision any application of the Fourteenth Amendment by state or local officials in efforts to legally challenge portions of the No Child Left Behind Act.

Instead of the Fourteenth Amendment being used by one of the states or its agencies to challenge assertions of federal control, the reverse might well hold true, particularly if combined with the Guarantee Clause of the Constitution as was discussed in the summary of the chapter centering on the Guarantee Clause. Given the importance of education in today’s world, given the role that education plays in equipping young people to become economically engaged and to exercise their citizenship responsibilities, and given the disparate performances of individual state systems of public education, Congress could assert primary control over education in this

country using both the Guarantee Clause and the Fourteenth Amendment to justify its assertion. The argument used by Congress would be that an educated citizenry is essential for the maintenance and perpetuation of a republican form of government. The Fourteenth Amendment portion of the argument would be that the existence of separate state systems of public education deny the equal protection of the laws through their uneven performances in terms of student achievement, not to mention the existence of achievement gaps of student groups based upon both racial/ethnic background and socioeconomic status.

Such an action might prove difficult to challenge. According to the case law, which runs from *Luther v. Borden* to the modern-day, Congress is the main determiner of what constitutes a republican form of government. Also, congressional determinations regarding a republican form of government do not present a justiciable cause of action for the courts, according to an impressive array of the case law centering on the Guarantee Clause.

Of course, such a policy course would violate the use of federalism as a public policy approach. Such a policy approach on the part of the federal government would also require that much adaptive work occur to overcome long traditions of state control of public education which generally incorporate features of local control through publicly elected boards of education in each of the school districts. However, if utilized as an approach to the issue of children's well-being in this country that also addressed the components of systems thinking articulated by Senge, it would not violate systems thinking per se. The "teamwork" component of systems thinking would present a significant obstacle to overcome. As a result, a policy approach whereby Congress used both the Guarantee Clause and the Fourteenth Amendment to assert primary control over public education would most definitely run counter to adaptive work and the use of federalism as a public policy approach; it would most likely violate the concept of

systems thinking as well. Most important, however, in any discussion regarding the assertion of federal control over education, is the attitude of the public. Because of great public support for local control of public education, and because of the deep vein of distrust of centralized authority in America (except in emergencies and catastrophes, both natural, militarily, and economically), outright control of public education by the federal government remains unlikely as public attitudes now stand.



## Chapter 8

### The Eleventh Amendment

#### Introduction

The Eleventh Amendment constitutes a point of ignorance and irrelevancy for most Americans who are more familiar with the Bill of Rights (Amendments 1-10) and the Civil War Amendments (Amendments 13, 14, & 15), a view typified by the following comment of a legal scholar, who stated, “Between the Tenth Amendment and the Reconstruction Amendments, of course, came the intervening Eleventh and Twelfth Amendments” (Amar, 1998, p. 124 n). The Eleventh Amendment was specifically proposed and adopted for the purpose of overturning a Supreme Court decision that, as will be shown later, went against the understanding of some (but not all) of the Constitution’s Framers as well as most of the Federalists at the constitutional ratification conventions in the various states (see Monk, p. 199; Levy, pp. 57-59; see also the “Historical Background” section of this chapter). Confusion arose because of different understandings and perspectives regarding the question of whether or not a state could be sued in court, especially by citizens of other states. As one scholar of constitutional law noted, nothing that was said at the Constitutional Convention in Philadelphia provided an answer (Levy, p. 56). However, the text of Article III, § 2 of the U.S. Constitution clearly extended federal judicial power to “controversies ... between a state and citizens of another state.” However, judged in terms of the context provided by the ratification controversy by the state conventions, Article III, § 2 didn’t really mean what it said.

The reason is that after opponents of the Constitution condemned the clause because it derogated from state sovereignty, advocates of ratification explained that it meant only cases in which a state had given consent or had initiated the suit as a plaintiff. (Levy, p. 56)

The Eleventh Amendment officially installed a concept that came to the American colonies by way of English common law (See subsequent “Historical Background” section of this chapter). After being adopted, the Amendment received rough treatment at the hands of the Supreme Court. According to one historical account, “Marshall’s Court rejected Eleventh Amendment arguments in ten of eleven cases raising them. The Court under Chief Justice Roger Taney (1836-1864) did so in five of five” (Hall, 1992, p. 382). Subsequently, the Eleventh Amendment lay relatively dormant until the latter part of the twentieth century when it became the basis for several Supreme Court decisions (see subsequent “Case Law” section of this chapter).

### **Historical Background**

The Eleventh Amendment to the Constitution of the United States, based on the concept of sovereign immunity, reads as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

#### **Sovereign immunity – The english experience.**

The principle of sovereign immunity came to the American colonies through its development in early English common law, which declared “that the king was immune from suit by his subjects” (Hall, 1992, p. 806). When brought to America, the principle was closely associated with the maxim, “The King can do no wrong” (Hall, 1992, p. 288). However, as will be shown, the maxim had a different interpretation when first originated. Both interpretations (the original 13th century explanation and the later 18th century explication) provided opposite answers to the question originally posed by Aristotle regarding whether it was better to be ruled by law or by men (See n. # 67).

As first developed, the maxim flowed from the application of natural law concepts to political rule by Aristotle, Cicero, and subsequent medieval thinkers. After an extended period, during which time classical political thought lay dormant, a twelfth-century Englishman, John of Salisbury, who had studied under Peter Abelard in Paris, became one of the first medieval thinkers to “take up political theory in any extended way” (Audi, p. 454; see also Corwin, 1965, p. 17). According to John of Salisbury, a ruler who answered Aristotle’s question by declaring a preference for the rule of men was a “tyrant” because he was “one who oppresses the people by rulership based upon force” (Corwin, 1965, pp. 18-19). On the other hand, a ruler who preferred the rule of law as the answer to Aristotle’s question deserved the title of “prince” because he was “one who rules in accordance with the laws” (Corwin, 1965, p. 19). As John of Salisbury explained, the ruler “may not lawfully have any will of his own apart from that which the law or equity enjoins, or the calculation of the common interest requires” (Corwin, 1965, p. 19). As summarized by Professor Corwin, John of Salisbury concluded that the linguistic roots of Latin proved his point, “Indeed the very title *rex* is derived from doing right, that is, acting in accordance with law (*recte*)” (Emphasis in original) (Corwin, 1965, p. 19). Furthermore, according to John, if a ruler chose to substitute his own rule for the rule of law, “legitimate resistance to him can include his assassination” (Audi, p. 454). After summarizing natural law’s connection with positive (human) law, Corwin compared classical and medieval thoughts about natural law:

[C]lassical antiquity erected the conception of a law of nature discoverable by human reason when uninfluenced by passion and forming the ultimate source and explanation of the excellence of positive law.... [W]hereas the classical conception of natural law was that it conferred its chief benefits by entering into the more deliberate acts of human authority, the medieval conception was that it checked and delimited authority from without.... In ancient theory *jus naturale* was a *terminus ad quem* – a goal toward which actual law inevitably tended; in medieval theory it was a *terminus a quo* – a

standard from which human authority was always straying. (Emphasis in original) (Corwin, 1965, pp. 22, 22-23, p. 23, n. 64)

John of Salisbury's line of political thought was continued by Henry de Bracton, a judge of the King's Bench during the reign of Henry III, who was considered to be "the greatest of English medieval jurists" (Willson, p. 148; see also Corwin, 1965, p. 27). In providing his and England's answer to Aristotle's question, Bracton united natural law, English common law, and the idea of a higher law. According to Bracton:

The King himself ought not to be subject to man, but subject to God and to the law, for the law makes the King. Let the King then attribute to the law what the law attributes to him, namely, dominion and power, for there is no King where the will and not the law has dominion. (Corwin, 1965, p. 27)

And, as described by Professor Corwin, Bracton offered a religious paraphrase of John of Salisbury's theoretical observations about politics. According to Professor Corwin:

The King's power, he writes, is the power of justice, not of injustice. So long as he does justice, the King is the vicar of God; but when he turns aside to injustice, he is the minister of the devil. Indeed, he is called King (*rex*) from ruling well (*regendo*), not from reigning (*regnando*). (Emphasis in original) (Corwin, 1965, p. 27)

During Bracton's life, the maxim offered by royalists was that "the pleasure of the prince has the force of law" (Corwin, 1965, p. 28). Not so, according to Bracton. Only "that which has been rightly defined with the counsel of his magistrates, the King himself authorizing it, and deliberation and discussion having been had upon it" has the force of law (Corwin, 1965, p. 28). Regarding the maxim offered earlier as justification for sovereign immunity, Professor Corwin pointed out its original meaning, a meaning just the opposite of its literal interpretation. Corwin wrote:

The origin of the maxim that "the King can do no wrong" has been assigned by some authorities to the minority of Henry III; but if the saying existed in Bracton's day, it meant nearly the opposite of what it does today. "If the King, or anybody else, said that the King 'could not' do something, that

meant, not that the act would not, if done, be attributed to the king, but that the king was no more allowed to do it, than a subject was allowed to commit a trespass or a felony.” Ehrlich, *Proceeding Against the Crown* (6 Oxford Studies in Leg. And Soc. Hist. 1921) 127. (Corwin, 1965, p. 29, n. 82)

So, originally the maxim indicated a preference for the rule of law, while the literal interpretation subsequently used indicated a preference for the rule of men with a corresponding focus upon accomplishing the will of the ruler without regard to the law. It would be several centuries before the principle regarding the separation of powers would be articulated by Montesquieu, a few hundred years before separation of powers would be combined with judicial review to form an institutional check on abuses of sovereignty in the Massachusetts Constitution of 1780, and also centuries before institutional checks upon governmental abuse of power would be implemented in the U.S. Constitution.

The rationale for the literal interpretation of the maxim regarding sovereign immunity “was that since law emanated from the sovereign, he could not be held accountable in courts of his own creation” (Hall, 1992, p. 806). The doctrine of sovereign immunity for the king and his agents was transferred in the United States to both state and federal governments. Or, at least, that’s what some of the Framers thought. That the Framers had discussed the idea of sovereign immunity regarding the issue of taxation was plainly stated by Alexander Hamilton in *The Federalist* (No. 81, p. 456).<sup>110</sup> However, the Anti-Federalists had not participated in the Constitutional Convention and argued that Article III, § 2 of the Constitution abrogated a state’s sovereign immunity by extending the federal judicial power to include “Controversies ... between a State and Citizens of another State” (U.S. Constitution, Article III, § 2).

### **Sovereign immunity and the american political experience prior to the constitution.**

The issue of sovereign immunity for the state governments was particularly immediate because of the huge debts most states had contracted, both during and after the Revolutionary

War. After assuming his duties as the Secretary of the Treasury, Alexander Hamilton had estimated that the combined debts of the states totaled between \$21 and \$25 million (PAH, 6: 119; see also previous discussion in “Historical Background” section of Chapter Six of this paper). The nightmare envisioned by the states was a horde of creditors filing suits against the state governments to collect on unpaid debts contracted for a variety of expenses.

Anti-Federalists also feared that the Constitution would eliminate state judicial systems by consolidating the state courts and absorbing them into the federal court system (Hall, 1992, p. 144). Immediately following the Constitutional Convention, George Mason, a constitutional delegate from Virginia who had refused to sign the Constitution, published a list of his objections in the October 4, 1787 *Pennsylvania Packet* that included his fear that “the federal judiciary would destroy and absorb the state judiciaries” (Bowen, p. 268). Anti-Federalist fears of absorption of state judiciaries was part of an overall fear regarding “consolidation” of the states into an “empire” as described by one historian:

This new Constitution was patterned after the English system surely. Under it the United States would no longer be a confederation of free sovereign states but a consolidation, an empire. The very word *consolidation* was an offense against “first principles,” against the principles of the Revolution that Americans had fought for. The spirit of ’75 – had it then vanished with victory? (Emphasis in original) (Bowen, p. 268)

Anti-Federalist fears of federal “consolidation” were also articulated by Patrick Henry, who asked rhetorically:

Whither is the spirit of America gone? Whither is the genius of America fled? ...We drew the spirit of liberty from our British ancestors. But now, Sir, the American spirit, assisted by the *ropes and chains of consolidation*, is about to convert this country into a powerful and mighty empire.... There will be no checks, no real balances, in this government. What can avail your specious, imaginary balances, your rope-dancing, chain-rattling, ridiculous ideal checks and contrivances? (Emphasis added) (Bowen, pp. 297-298)

Writing to rebut the Anti-Federalists' claim regarding sovereign immunity in *The Federalist*, Alexander Hamilton, as Publius, had written:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. (Emphasis in original) (No. 81, p. 455)

Three sentences later, Hamilton flatly stated “that there is no color to pretend that the State governments would, by the adoption of [the Constitution], be divested of” their sovereign immunity (No. 81, p. 456).

### **Sovereign immunity and the state ratifying conventions for the constitution.**

Hamilton's view of sovereign immunity was echoed by James Madison during the Virginia convention to ratify the proposed Constitution. The Virginia state ratifying convention served as a key battleground over the debate regarding sovereign immunity as well as other issues on which the Federalists and Anti-Federalists differed. When the Virginians began their convention in early June, eight of their sister states had already ratified the newly proposed Constitution (see Appendix U). Today, since we know the outcome, the contemporary person often glosses over or is ignorant of the critical nature of the original event. At least one historian has cautioned:

At several points in this study, I have urged that the person in search of the past must affect an innocence of the future. Our knowledge of how events ultimately worked out too easily gives us a false perspective on how they came to be. (Fredriksen, p. 202)

However, because we know that the Constitution was duly ratified by the states, we tend to ignore and forget what a close thing the event actually was as well as being aware of what the critical issues were (see Appendix U for the state ratification votes for Massachusetts, New Hampshire, Virginia, and New York). This is particularly true of the Virginia convention in

which the opposing forces were so evenly matched. Besides being one of the larger states, Virginians had played a critical role in the Constitutional Convention. However, Anti-Federalists were also strong in Virginia. When the state ratifying convention began, the delegate totals for each side were practically even (Rossiter, p. 291). It was also a convention that pitted Constitutional Framers against one another. George Mason had refused to sign the Constitution and served as a leading Anti-Federalist (Bowen, pp. 261, 268; Rossiter, pp. 250, 291). Historians regarded the Virginia ratification convention as one of the best of the state conventions as well as one of the most critical for the outcome of the Constitution. According to one source:

In no convention were the opponents of the Constitution able to meet the friends on such equal terms... The debates, which lasted the better part of four weeks, were the most searching, exciting, and well-reported of any convention. By the time of the decisive vote..., neither the wildly slashing [Patrick] Henry nor the neatly parrying [James] Madison, who rose to heights as lofty as those he had reached in Philadelphia, could deny that every potential defect and every real merit of the Constitution had been candidly exposed. (Rossiter, p. 291)

Another historian described the Virginia ratifying convention in the following manner:

This was to be the ablest of all the ratification conventions and the best prepared, a gathering studded with stars, with names and faces known throughout the state and well beyond – well-speaking gentlemen on both sides, well-dressed, wellborn. More than a fourth were military men.... They had fought the British, they had fought the Indians, and in political conviction they were ranged on both sides. (Bowen, pp. 294-295)

The outcome would be critical, for as one commentator noted, “A nine-state Union without Virginia, however, would be no union at all” (Rossiter, p. 291). Actually, Virginia was one of four states, “[a]ny one of [which] – Massachusetts, New York, Pennsylvania, and Virginia – was in a physical and political position to wreck the whole scheme by holding out” (Rossiter, p. 279).

As previously mentioned, sovereign immunity was one of the critical issues discussed in the Virginia ratifying convention, and it was at the Virginia convention where the idea received



its most thorough discussion. In answer to the charge that under Article III, § 2 of the Constitution, Virginia would “be brought before the bar of [federal] justice to be arraigned like a culprit, or private offender,” Madison’s reply echoed that provided previously by Hamilton in *The Federalist*: “It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court” (Levy, p. 57). Patrick Henry responded to Madison and heaped ridicule upon the argument “that the state may be plaintiff only,” which was a clear “perversion of the text’s language” (Levy, p. 57). To this, John Marshall responded by clearly stating “the fundamental Federalist position on the clause” (Levy, p. 57). Marshall declared:

I hope that no gentleman will think that a state will be called at the bar of the federal court.... It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals in other states. I contend this construction is warranted by the words. (Levy, pp. 57-58)

By a relatively narrow vote the Federalist interpretation, as presented by Hamilton, Madison, and Marshall, prevailed in Virginia’s state ratifying convention, and the Constitution was duly ratified. However, by the time discussion came to an end and a vote was taken in Virginia, New Hampshire had ratified four days previously, thus making Virginia the tenth state to ratify the Constitution. More importantly, Virginia was the third of the four large states to ratify the Constitution (see Appendix U for constitutional ratification dates by Pennsylvania, Massachusetts, Virginia, & New York). Perhaps one of the reasons the Federalists prevailed in Virginia was their agreement to submit a proposal to Congress that the grant of judicial power in Article III, § 2 be rewritten so that it omitted suits “between a State and citizens of another State” (Mathis, 1968, p. 214, n. 26).

In New York, the concept of sovereign immunity did not occupy center stage. Instead New York's debate was dominated by two dismal prospects brilliantly framed by Alexander Hamilton: first, the spectre of staying outside the newly formed Union with only Rhode Island and North Carolina for company; and second, the unwelcome possibility that the City of New York, accompanied by southern New York counties, would secede from the state in order to join the Union (Rossiter, pp. 293-294). Thus, the looming specter of isolation played a large role in New York's ratification of the Constitution. However, sovereign immunity did receive some attention in New York as it formed the basis of a proposed amendment to the Constitution forwarded to Congress by the New York constitutional ratification convention. According to a federal appellate judge who also served as an adjunct professor of law at both Rutgers University Law School and Seton Hall University Law School:

The understanding of the convention on state sovereign immunity can best be gleaned from the text of a proposed amendment that it submitted to the First Congress: "that nothing in the Constitution now under consideration contained, is to be construed to authorize any suit to be brought against any state, in any manner whatever." (Gibbons, p. 1912)

As Judge Gibbons observed, "Such an amendment would have constitutionalized a rule of state sovereign immunity" (Gibbons, p. 1912). The judge for the United States Court of Appeals for the Third Circuit continued:

That the New York ratifying convention deemed this amendment necessary to accomplish that result [a constitutional rule regarding state sovereign immunity] suggests that despite anything Hamilton said in *The Federalist No. 81*, the delegates understood that, under section 2 of article III, states were in some instances subject to suit. (Gibbons, p. 1912).

The last two states to ratify the Constitution, North Carolina and Rhode Island, did not hold state ratifying conventions for the Constitution until after Congress had submitted what became the Bill of Rights to the state legislatures for ratification as constitutional amendments

one through ten. Even then, each state's convention proposed to Congress that an additional amendment be added regarding sovereign immunity. North Carolina adopted Virginia's approach in suggesting that Article III, § 2 be rewritten so that it omitted suits "between a State and citizens of another State" (Mathis, 1968, p. 214, n. 26). Rhode Island, the last state to ratify the Constitution (See Appendix U for comparative dates) followed New York's example by proposing that Congress submit an additional amendment to the states for their approval whereby all lawsuits by individuals against any of the states would be constitutionally prohibited (Mathis, 1968, p. 214, n. 26). Congress, however, would take no further action until convinced to do so by subsequent events.

**Chisholm v. Georgia: Summary of the primary catalyst for the eleventh amendment.**

The troubling question of sovereign immunity arose once again in *Chisholm v. Georgia*, 2 U.S. 419 (1793), a case brought by Alexander Chisholm, a citizen of Charleston, South Carolina serving as executor for a merchant, Robert Farquhar (also from Charleston, South Carolina), who had supplied clothing to Georgia's colonial forces during the Revolutionary War (Mathis, 1968, pp. 217-218; Hall, 1992, p. 144).<sup>111</sup> The lawsuit was to recover the value of the clothing supplied by the merchant to Georgia's troops as authorized by the Executive Council of Georgia, but for which payment had not been made by the state.<sup>112</sup> First filed in the United States Circuit Court for the District of Georgia after the Georgia legislature had rejected Chisholm's claim on behalf of Farquhar, *Farquhar's Executor v. Georgia* was decided during "the October 1791 term of the Circuit Court" (Mathis, 1968, p. 218). Although the original amount of the sale had been listed as "£63,605, South Carolina currency," the lawsuit was for "£100,000 sterling (principal, interest, and damages)" (Jacobs, p. 47). Georgia's response was to assert sovereign immunity and to plead the following: "the state of Georgia cannot be drawn or

compelled to answer against the will of the said State before any Justices of any Court of Law or Equity whatsoever” (Jacobs, p. 47). The two judges who heard the case, James Iredell (Justice of the U.S. Supreme Court on circuit) and Nathaniel Pendleton (Judge of the U.S. District Court for Georgia) agreed with Georgia’s assertion and ruled that “Georgia could not be sued by a citizen of South Carolina in the Circuit Court” (Mathis, 1968, p. 218).

Chisholm, however, refused to let the matter end so unsatisfactorily. Rather than appealing the lower court’s decision by filing for a writ of error, Chisholm instead filed “an original suit in the Supreme Court” (Jacobs, p. 47, n. 31). Although papers had been served to the Governor and Attorney General of Georgia, the state refused to appear, having instructed attorneys to deliver “a written remonstrance and protestation on behalf of the state, against the exercise of jurisdiction in the cause” because of sovereign immunity (2 U.S. 419). The attorneys were also instructed that they were not to take “any part in arguing the question” before the Court (2 U.S. 419). Edmund Randolph, the U.S. Attorney General who had represented Virginia at the Constitutional Convention in Philadelphia, argued the case for Chisholm.

The case was heard by four Justices, Patterson not having been yet selected to fill the seat left vacant by Justice Johnson’s resignation (2 U.S. 419, 479, n. b). One of the Justices, John Jay, had helped author *The Federalist*, having written only three articles because of illness (Hall, 1992, p. 446). Another Justice, James Wilson, had represented Pennsylvania at the Constitutional Convention “where he played a part second only to James Madison’s” role (Hall, 1992, p. 933). A third Justice, William Cushing, had served as the vice president of the Massachusetts convention that “narrowly ratified the document [the U.S. Constitution] in February 1788” (Hall, 1992, p. 213). Because of his strong support of the Constitution and because of his demonstrated legal expertise, Cushing had also been the “first associate justice

that George Washington appointed” to the Supreme Court (Hall, 1992, p. 213). Cushing had also previously served in the state convention “that drafted the Massachusetts Constitution of 1780,” the same constitution that answered Aristotle’s ancient query with the declaration that, in Massachusetts at least, the citizens would be governed by “a government of laws and not of men” (Hall, 1992, p. 213; Massachusetts Constitution of 1780, Article XXX). The fourth Justice, James Iredell, had been selected by Washington to serve on the Court because of his “eloquent and energetic efforts in behalf of the ratification of the Constitution” in North Carolina as well as his prior legal experience (Hall, 1992, p. 440).

With all of the Justices sitting on the Court possessing such staunch Federalist credentials, the deck should have appeared to have been stacked against Chisholm’s efforts to sue the State of Georgia for an unpaid bill. Such, however, proved not to be the case. Perhaps part of the reason lies in the fact that while the issue may have been discussed at the Constitutional Convention, no definitive answer was reached. Such, at least, was part of the answer provided by one constitutional historian. First, he laid out the issue:

*Chisholm v. Georgia* (1793) ... involved the question whether a state could be sued in the Supreme Court by a citizen of another state without its consent. Nothing said at the Philadelphia Convention answers that question, but the text of the Constitution seems to extend the judicial power of the United States to “controversies ... between a state and citizens of another state.” (Levy, p. 56)

Next, he presented the problem and its political solution:

But that provision of Article III, understood in the context of the ratification controversy, seems not to mean what it says. The reason is that after opponents of the Constitution condemned the clause because it derogated from state sovereignty, advocates of ratification explained that it meant only cases in which a state had given consent or had initiated the suit as plaintiff. (Levy, p. 56)

But perhaps the outcome of the case resulted primarily from the difference between making a political argument and making a legal decision based upon the law and on the Constitution. Of the five Justices, only Iredell sided with Georgia's claim for sovereign immunity, basing his decision on the English common law inherited by the new nation. The four remaining Justices, basing their decision on the Constitution and the ensuing Judiciary Act, held that "[a] state may be sued, in the supreme court [sic], by an individual citizen of another state" (2 U.S. 419). Justice Cushing asked two penetrating questions that went straight to the heart of the matter. First, in discussing Article III, § 2 of the Constitution by which the judicial power of the United States was extended "to Controversies between two or more States" as well as those "between a State and Citizens of another State," Justice Cushing both commented and questioned:

The case (*Chisholm v. Georgia*), then, seems clearly to fall within the letter of the constitution. It may be suggested, that it could not be intended to subject a state to be a defendant, because it would affect the sovereignty of states. If that be the case, what shall we do with the immediate preceding clause – "controversies between two or more states," where a state must of necessity be defendant? If it was not the intent, in the very next clause also, that a state might be made defendant, why was it so expressed, as naturally to lead to and comprehend that idea? Why was not an exception made, if one was intended? (2 U.S. 419, 467)

Justice Cushing grounded his next question in the purpose of republican government:

Further, if a state is entitled to justice in the federal court, against a citizen of another state, why not such citizen against the state, when the same language equally comprehends both? The rights of individuals and the justice due to them, are as dear and precious as those of states. Indeed, the latter are founded upon the former; and the great end and object of them must be, to secure and support the rights of individuals, or else, vain is government. (2 U.S. 419, 468)

In similar fashion, Justice Wilson situated the issue in the foundations of justice through use of a comparative homily that employed imagery grounded in a Greek myth:

A state, like a merchant, makes a contract. A dishonest state, like a dishonest merchant, willfully refuses to discharge it: the latter is amenable to a court of justice: upon general principles of right, shall the former, when summoned to answer the fair demands of its creditor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a *sovereign* state? Surely not. (Emphasis in original) (2 U.S. 419, 456)

Using rhetorical questions in the midst of his argument, Justice Blair summarized the legal position reached by four of the five Justices on the Court:

[T]he constitution ... gives to the supreme court original jurisdiction ... in the case where a state shall be a *party*; but is not a state a party as well in the condition of defendant, as in that of a plaintiff? And is the whole force of that expression satisfied, by confining its meaning to the case of a plaintiff-state? It seems to me, that if this court should refuse to hold jurisdiction of a case where a state is defendant, it would renounce part of the authority conferred, and consequently, part of the duty imposed on it by the constitution; because, it would be a refusal to take cognizance of a case, where a state is a party. (Emphasis in original) (2 U.S. 419, 451)

The legal reasoning used by the three majority Justices provides additional features of interest to twenty-first century readers for a number of reasons. First, the Court issued *seriatim* opinions, thereby following the English tradition wherein “appellate courts announced case outcomes through the separate opinions of each participating judge,” a practice used from the Court’s beginnings until ended by Chief Justice John Marshall in 1801, at which time the Court adopted the current practice of issuing a single majority opinion as part of Marshall’s attempt to make the Court a “coequal” branch of the federal government (Hall, 1992, p. 780).<sup>113</sup> Second, the opinions contained discussions about a number of interesting historical topics. Chief Justice Jay’s opinion provided a legal description of the American Revolution. Jay’s opinion also discussed the origin of the doctrine of sovereign immunity, which he then used to point out the difference in views of sovereignty between European countries and the United States. Chief Justice Jay also commented on the demands made by the concept of republican government upon justice. Justice Wilson’s opinion corrected Justice Iredell’s discussion regarding England’s

contribution to the doctrine of sovereign immunity by providing information about earlier Saxon treatment of the doctrine that was omitted by Justice Iredell. Justice Wilson also interpreted the meaning of the most common personification of justice in his opinion (See Figure 5: Justice).

*Figure 5:  
Justice*<sup>114</sup>



According to Justice Wilson, “Causes, and not parties to causes, are weighed by justice, in her equal scales: on the former solely, her attention is fixed: to the latter, she is, as she is painted, blind” (2 U.S. 419, 466).

In his own review of the English contributions to the doctrine of sovereign immunity, Justice Wilson corrected an omission by Justice Iredell in the latter Justice’s discussion of sovereign immunity. Iredell had focused upon the English developments of sovereign immunity



subsequent to the Norman invasion. Wilson observed that the practice of Saxon rulers prior to 1066, as well as the Norman rulers in England following their triumph under William at Hastings, was quite different from that discussed by Justice Iredell. According to Justice Wilson:

Under the Saxon government, a very different doctrine was held to be orthodox. Under that government, as we are informed by the Mirror of Justice, a book said by Sir Edward Coke, to have been written, in part, at least, before the conquest; under that government, it was ordained, that the King's court should be open to all plaintiffs, by which, without delay, they should have remedial writs, as well against the King or against the Queen, as against any other of the people. The law continued to be the same, for some centuries after the conquest. Until the time of Edward I., the King might have been sued as a common person. (2 U.S. 419, 459)

Justice Wilson also pointed out that despite the doctrine of sovereign immunity current in England, the King could be sued. Wilson observed:

True it is, that now, in England, the King must be sued in his courts, by petition; but even now, the difference is only in the form, not in the thing. The judgments or decrees of those courts will substantially be the same upon a precatory as upon a mandatory process. (2 U.S. 419, 459)

Chief Justice Jay's opinion contained several features of interest. First, the Chief Justice and co-author of *The Federalist* provided a legal description of the Revolutionary War in order to examine "the political situation we were in, prior to the revolution, and to the political rights which emerged from the revolution" (2 U.S. 419, 470). The Chief Justice began by describing the legal position of the colonies prior to the Revolution:

All of the country, now possessed by the United States, was then a part of the dominions appertaining to the crown of Great Britain. Every acre of land in this country was then held, mediately or immediately, by grants from that crown. All the people of this country were then subjects of the King of Great Britain, and owed allegiance to him; and all the civil authority then existing ... flowed from the head of the British Empire. (2 U.S. 419, 470)

Next, the Chief Justice examined the changed legal standing of the United States following the beginning of the American Revolution:

The revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time, providing for their more domestic concerns, by state conventions... From the crown of Great Britain, the sovereignty of their country passed to the people of it; ... and thirteen sovereignties were considered as emerged from the principles of the revolution ...; the people, nevertheless, continued to consider themselves, in a national point of view, as one people; ... (2 U.S. 419, 470)

Chief Justice Jay next proceeded to describe the situation under the Articles of Confederation and the newly approved Constitution:

[A]fterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the states, the basis of general government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity, established the present constitution. It is remarkable, that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, "We, the people of the United States, do ordain and establish this constitution." Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a constitution by which it was their will, that the state governments, should be bound, and to which the state constitutions should be made to conform. (2 U.S. 419, 470-471)

While the legal (as opposed to the usual political, social, or economic history) description of the emergence of the United States of America provided interest by itself, the Chief Justice used it as a springboard to launch into a discussion of the differences in sovereignty between the U.S. and the European countries, which, in turn, had implications for the doctrine of sovereign immunity in American jurisprudence. Chief Justice Jay began by describing sovereignty as it developed in Europe.

[T]he sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the prince as the sovereign, and the people as his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a court of justice or elsewhere. (2 U.S. 419, 471)

Jay continued his discussion of sovereignty as developed from feudal principles by describing the natural evolution of the doctrine of sovereign immunity:

That system contemplates him as being the fountain of honor and authority; and from his grace and grant, derives all franchises, immunities and privileges; it is easy to perceive, that such a sovereign could not be amendable to a court of justice, or subjected to judicial control and actual constraint. It was of necessity, therefore, that suability became incompatible with such sovereignty.... The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the prince and the subject. (2 U.S. 419, 471)

At this point, the Chief Justice counterposed American sovereignty:

No such ideas obtain here; at the revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects ... and have none to govern but themselves; the citizens of America are equal as fellow-citizens, and as joint-tenants in the sovereignty. (2 U.S. 419, 471-472)

Chief Justice Jay continued by discussing the difference in governance effected by the two different views of sovereignty.

Sovereignty is the right to govern. In Europe, the sovereignty is generally ascribed to the prince; here it rests with the people; there, the sovereign actually administers the government; here, never in a single instance; our governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns. (2 U.S. 419, 472)

The Chief Justice next posed the question regarding “whether suability [was] compatible with state sovereignty” (2 U.S. 419, 472). Proceeding to answer the inquiry he posed by asking yet another question, the nation’s first Chief Justice continued:

Suability by whom? Not a subject, for in this country there are none; not an inferior, for all the citizens being, as to civil rights, perfectly equal, there is not, in that respect, one citizen inferior to another. It is agreed, that one free citizen may sue another; the obvious dictates of justice, and the purposes of society demanding it. (2 U.S. 419, 472)

Jay next dismissed the notion of state sovereignty interfering with a lawsuit against it in much the same fashion as previously done by Justice Cushing by observing that it was permissible for one state to sue another state. The Chief Justice continued:

The only remnant of objection, therefore, that remains is, that the state is not bound to appear and answer as a defendant, at the suit of an individual; but why it is unreasonable that she should be so bound, is hard to conjecture: that rule is said to be a bad one, which does not work both ways; the citizens of Georgia are content with a right of suing citizens of other states; but are not content that citizens of other states should have a right to sue them. (2 U.S. 419, 473)

Such an objection as made by Georgia was repugnant to the idea of republican government.

According to C.J. Jay, “[T]rue republican government requires, that free and equal citizens should have free and equal justice” (2 U.S. 419, 476). Jay concluded, “The exception contended for, would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all” (2 U.S. 419, 477). The idea that the Constitution meant what it said, that the federal judiciary had jurisdiction in controversies between states and in controversies between a state and citizens of another state, such an idea was both “honest” and “useful” because it both taught and appreciated

the value of our free republican national government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice, without any danger of being overborne by the weight and number of their opponents; and because it brings into action and enforces this great and glorious principle, that the people are the sovereign of this country, and consequently, that fellow-citizens and joint-sovereigns cannot be degraded, by appearing with each other, in their own courts, to have their controversies determined. (2 U.S. 419, 479)

By tying together the legal description of the Revolution, a notion of a differing sovereignty springing from a constitutional republic, and the requirements of republican government, the Chief Justice found no room for a doctrine of sovereign immunity. The Chief Justice’s opinion was directly in line with those answers provided to Aristotle’s ancient query that preferred a government of laws. Sovereign immunity, whether applying to a government or an individual official, was founded on the special privilege of a ruler who was thought to be above the people,

not, as with the case of republican government, a servant of the people and thus accountable to them.

The Court ordered “that unless the said state shall either ... appear, or show cause to the contrary in this court, by the first day of next term, judgment by default shall be entered against the said state” (2 U.S. 479). At the following term of the Court, on August 5, 1793, Alexander Dallas and Jared Ingersoll appeared before the Court on Georgia’s behalf “to contend that judgment by default should not be entered against the State” and requested that the case be continued to the next term for argument to which the Court agreed (Mathis, 1968, pp. 222-223). Approximately one year after the original decision in *Chisholm*, on February 14, 1794, the Court “directed that judgment be entered for the plaintiff [Chisholm], and a writ of enquiry [sic] for damages was awarded against Georgia” (Mathis, 1968, p. 223). At the following term, on August 5, 1794, “the Court provided that a jury was to be summoned at the next term to inquire what damages the plaintiff should be awarded” (Mathis, 1968, p. 223). Professor Mathis summarized the closing events of the case:

However, the writ of enquiry for damages was apparently never sued out or executed, probably because Georgia made a settlement of the claims on December 9, 1794. The settlement was made with Peter Trezevant, husband of Elizabeth Farquhar. In return for a release of all the Farquhar claims, Trezevant accepted from Georgia eight certificates for the sum of slightly more than £7,586.<sup>115</sup> (Mathis, 1968, p. 223)

### **State and congressional responses to *chisholm v. georgia*.**

As might be imagined, the Court’s decision was greeted with hostility by most of the state governments and their officials. Georgia’s reaction was extreme. There the House of Representatives passed a bill “ordering the hanging of any federal official entering Georgia to enforce *Chisholm*,” such action having been made a felony in Georgia (Hall, 1992, p. 831; see also Fletcher, p. 1058; Levy, p. 58; Mathis, 1968, p. 226, n. 72; Warren, p. 101). The action by

Georgia's House also denied any offender the benefit of the clergy before he was to be hanged (Fletcher, p. 1058; Levy, p. 58; Mathis, 1968, p. 226, n. 72; Warren, p. 101). Cooler heads prevailed in the Georgia Senate, however, which prevented the bill from becoming law, perhaps owing to the possibility of a constitutional amendment and perhaps because of Governor Telfair's advocacy of such an approach (Jacobs, pp. 55-57).

The actions of the Virginia legislature were more measured and calculated as part of a campaign designed to combat the Court's *Chisholm* decision. First, both chambers of the Virginia legislature passed a resolution, which declared Virginia's opposition to the outcome of *Chisholm v. Georgia* and that also resurrected the Anti-Federalist "consolidation" argument against the Constitution. The resolution declared that the Court's decision was "incompatible with and dangerous to the sovereignty of the individual states, as the same tends to a general consolidation of these confederated republics" (Jacobs, p. 59). The second Virginia legislative resolution "instructed the state's senators and requested its representatives to unite with those of other states in obtaining clarifying amendments to the Constitution" (Jacobs, p. 59).

On February 19, 1793, just one day after the Court announced its decision, the House of Representatives offered the first of a series of resolutions that eventually became the Eleventh Amendment to the Constitution (Levy, p. 59).<sup>116</sup> As reported, the resolution's content followed the recommendation offered by the New York and Rhode Island constitutional ratification conventions that would have "constitutionalized a rule of state sovereign immunity" (Gibbons, p. 1912; Mathis, 1968, p. 214, n. 26). On February 20, 1793, two days after the Court's decision in *Chisholm v. Georgia*, an unnamed senator offered the following motion:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, two-thirds of both Houses concurring, That the following article be proposed to the Legislatures of the several States, as an amendment to the Constitution of the United States; which, when ratified*

by three-fourths of the said Legislatures, shall be valid as part of the said Constitution, viz:

“The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.” (Emphasis in original) (Annals of Congress, 3, pp. 651-652)

This proposal differed from that offered in the House in that it no longer offered a generalized sovereign immunity for states, but instead was particularized to focus only on suits against a state coming from citizens outside of the state, whether American or foreign. No mention was made either of any action being taken on the motion or if the motion was even seconded by another senator.<sup>117</sup> However, five days later, on February 25th, it was recorded that “[t]he Senate resumed the consideration of the motion, made the 20th instant, respecting an additional article of amendment to the Constitution of the United States” (Annals of Congress, 3, p. 656). After rejecting a motion “to postpone the consideration thereof to the next session of Congress,” the Senate further debated the matter without recording any of the remarks made by the senators and then postponed “the further consideration thereof” without mentioning the length of postponement or the date at which it would be further considered (Annals of Congress, 3, p. 656). On March 2, 1793, the Second Congress adjourned with no action on the proposal for a constitutional amendment regarding sovereign immunity having been taken by either the House or the Senate.

Some eleven months later, on Thursday, January 2, 1794, the Senate (still meeting behind closed doors, but keeping a public record of its proceedings as part of the Third Congress; see previous n. 93) offered the following motion and then postponed “further consideration” until January 13th:

*Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, two-thirds of both Houses concurring, That*

the following article be proposed to the Legislatures of the several States, as an amendment to the Constitution of the United States; which, when ratified by three-fourths of the said Legislatures, shall be valid as part of the said Constitution, to wit:

“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.” (Emphasis in original) (Annals of Congress, 4, p. 25)

The only difference between this proposal and the one offered the previous February in the Senate was the addition of the words “be construed to.” On Monday, January 13, 1794, the Senate delayed consideration of the constitutional amendment until the following day (Annals of Congress, 4, p. 29). On Tuesday, January 14, 1794, the Senate discussed the proposed amendment relating to sovereign immunity. The following alteration to the amendment (with the changed portions being in boldface print) was proposed by Senator Gallatin of Pennsylvania:

The Judicial power of the United States, **except in cases arising under treaties made under the authority of the United States**, shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State. (Emphasis added) (Annals of Congress, 4, p. 30; see also Gibbons, pp. 1932-1933)

As can be seen, the bold-faced provision would have ensured that the federal courts could be used to assure compliance with treaties, a provision near and dear to the hearts of western Pennsylvanians because of the “pending negotiations with Great Britain concerning evacuation of the northwestern posts” and because of western Pennsylvania’s “vulnerability to Indian attacks” (Gibbons, p. 1933). Gallatin’s motion was defeated, however, by an unreported vote total. Another change to the constitutional amendment was offered by an unnamed senator (the changed portion being identified by boldface print):

The Judicial Power of the United States **extends to all cases in law and equity in which one of the United States is a party; but no suit shall be prosecuted against one of the United States by citizens of another State,**



**or by citizens or subjects of a foreign State, where the cause of action shall have arisen before the ratification of this amendment.** (Emphasis added) (Annals of Congress, 4, p. 30)

As can be seen, this change would have alleviated the worries and concerns about the states' Revolutionary War debts as well as suits by Loyalists and Tories (or their executors, as citizens) to recover property confiscated by the various states during the Revolution. It would also have placed state governments and their officials under the rule of law instead of carving out a special exemption for them under the doctrine of sovereign immunity. This intention was frustrated as the proposed change was also defeated, again by an unrecorded vote total (Annals of Congress, 4, p. 30). The constitutional amendment as originally presented on the Senate floor on January 2, 1794, was then voted on and passed by a 23-2 vote (Annals of Congress, 4, p. 30). The only negative votes were those cast by Albert Gallatin of Pennsylvania and John Rutherford of New Jersey (Annals of Congress, 4, p. 31). No discussion regarding any of the motions, either for or against, was recorded.

Although the Senate approved the proposed Eleventh Amendment on January 14th, the House didn't begin its consideration of the proposed amendment until Tuesday, March 4, 1794, when it moved into a "Committee of the Whole House" to consider "the resolution sent from the Senate, 'proposing an article of amendment to the Constitution of the United States, respecting the Judicial power;'" (Annals of Congress, 4, p. 476). Making no changes to the Senate's proposal, the House emerged from meeting as a committee of the whole, resumed official operation as the House of Representatives in regular session, and offered the following change to the official Senate version (the House change printed in boldface):

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State, **Where such State shall have previously made provision in**

**their own Courts, whereby such suit may be prosecuted to effect.**

(Emphasis added) (Annals of Congress, 4, p. 476)

The proposed change was defeated 77-8 (Annals of Congress, 4, p. 476). The official Senate version was then voted on by the House and approved 81-9 (Annals of Congress, 4, p. 477). The opposing votes came from the following Representatives: John Beatty, New Jersey; Elias Boudinot, New Jersey; Thomas Fitzsimmons, Pennsylvania; Thomas Scott, Pennsylvania; George Hancock, Virginia; William Hindman, Maryland; Andrew Pickens, South Carolina; Silas Talbot, New York; and Artemas Ward, Massachusetts (Annals of Congress, 4, p. 478). Of the 9 votes opposing the Eleventh Amendment, six had voted in favor of the previously rejected House change to the Senate-approved version of the Eleventh Amendment: Beatty, Boudinot, Scott, Hindman, Pickens, and Talbot (Annals of Congress, 4, p. 476). As can be surmised from the votes against the Amendment in Congress, opposition to the Eleventh Amendment was particularly strong in Pennsylvania and in New Jersey. Neither of their state legislatures approved the Eleventh Amendment when it was submitted to them by Congress (Jacobs, p. 67; see also Appendix V). At the time, Pennsylvania was the only state that permitted lawsuits against the state by individuals in the state court system (Jacobs, p. 67, n. 99).

Officially approved by Congress on March 4, 1794, the date of the House's passage of the Senate-approved version, the proposed Eleventh Amendment was sent to each of the fifteen state legislatures where it was approved by the required three-fourths of the state legislatures on February 7, 1795 (Hall, 1992, p. 250). However, this was not known until later because of the "erratic" certification of action by the state legislatures and officials (Jacobs, p. 67) (See Appendix V). Although twelve state legislatures had ratified the Eleventh Amendment by February 1795, only eight states had communicated the result to President Washington, who had forwarded such communication to Congress after he had received it (Jacobs, p. 67; see also

Annals of Congress, 4, pp. 847, 1253, 1275 for acknowledgment by the Senate and House for receiving letters forwarded by President Washington from Georgia and Delaware regarding their approval of the Eleventh Amendment). Such was the situation still existing in January 1796 (Jacobs, p. 67; also, see Appendix V).

Confusion also occurred regarding who was responsible for determining the official date as to when the three-fourths ratification requirement was met. As a result, two dates came to exist for when the Eleventh Amendment was determined to become effective. Initially, the date given was January 8, 1798, the date when the President formally declared the Amendment to be a part of the Constitution during the presidential message to Congress by President John Adams (Hall, 1992, p. 250). However, it was later “recognized that the president has no role in the process of amendment, so 1795 is gaining recognition as its effective date” (Hall, 1992, pp. 250-251). February 7, 1795, was the date on which the North Carolina legislature, the twelfth state to do so, ratified the Eleventh Amendment (see Appendix V).

The procedure by which President Adams became involved in certifying the actions of the ratifying states provided another feature of interest to the whole affair. On January 31, Senator Tazewell, on behalf of the “committee on the subject of amendments to the Constitution of the United States” reported the committee’s findings regarding state actions taken to proposed amendments, beginning with the first twelve authorized by Congress (Annals of Congress, 6, p. 1537). With regards to the “amendment respecting the suability of States,” Tazewell reported that the following states had “ratified” the amendment “as appears by authentic documents returned to Congress” through President Washington: “New York, Massachusetts, Vermont, New Hampshire, Georgia, Delaware, Rhode Island, and North Carolina” (Annals of Congress, 6, p. 1537). The Senate committee report also stated that the committee had “strong reasons to

believe that other States have ratified this latter amendment, and that the evidences of the fact have not been as yet returned to the proper Departments of the Government” (Annals of Congress, 6, p. 1537). The report concluded by stating that the required three-fourths rule had not been made in order for the proposed amendment to become part of the Constitution. The Senate Proceedings next presented the following without reporting any discussion or informing the public that the Senate had taken positive action regarding it:

*Resolved, by the Senate and House of Representatives of the United States,*  
That the President be requested to adopt some speedy and effectual means of obtaining information from the States of Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, Kentucky, Tennessee, and South Carolina, whether they have ratified the amendment proposed by Congress to the Constitution concerning the suability of States; if they have, to obtain the proper evidence thereof.

*Ordered,* That the Secretary desire the concurrence of the House of Representatives in this resolution. (Emphasis in original) (Annals of Congress, 6, p. 1537)

That the Senate had indeed taken positive action on January 31, 1797, can be surmised from two facts reported elsewhere in the Annals on February 1 and on February 25, 1797. First, on February 1, 1797, the House reported that they had received a resolution from the Senate regarding the suability of States, which they copied into their minutes, a copy identical to the copy presented above (Annals of Congress, 6, 2057). After discussing and rejecting the possibility of dealing with the Senate’s proposal in a “Committee of the Whole,” the House agreed to refer the matter “to a select committee” composed of five House members (Annals of Congress, 6, 2057). On February 15, Representative Harper reported to the House the Committee’s initial findings, which reported nothing regarding the proposed Eleventh Amendment. Instead Harper reported that the committee had been unable to find any record that the first ten amendments to the Constitution had been properly ratified by the required three-

fourths of the state legislatures. The committee asked that the House request the President to investigate the situation and report to them his findings (Annals of Congress, 6, p. 2163). Six days later, on February 21, 1797, Representative Harper presented another report from the committee regarding the “amendments [sic] proposed to the Constitution respecting the suability of States,” which was accompanied by the recommendation “that the President be requested to inquire what States had agreed to the said amendment” (Annals of Congress, 6, p. 2223). The House decided to refer the matter “to a Committee of the Whole” on the following day (Annals of Congress, 6, p. 2223). On the following day, February 22nd, the House “resolved itself into a Committee of the Whole” to discuss the committee’s report and the Senate resolution (Annals of Congress, 6, p. 2248). However, because of the extreme noise emanating from without by cannon fire, beating drums, and the playing of fifes in “commemoration of the President’s birth day [sic],” the House decided to move out of the Committee of the Whole and consider the matter at another time as “the report was important” (Annals of Congress, 6, 2248). Two days later, on February 24th, the House moved “into a Committee of the Whole” to discuss both the committee’s report on the initial twelve amendments proposed by Congress in 1789 as well as the Senate resolution (Annals of Congress, 6, p. 2281). The question regarding the amendments contained in the Bill of Rights turned on the question of whether eleven ratifying states constituted the required three-fourths of the fourteen states who had been members of the Union in 1789, the question turning on the additional question of whether or not a state was divisible (eleven was mathematically more than three-fourths of fourteen, but this implied that a state could be divided since three-fourths of fourteen did not present an even number. This, in turn, raised the possibility that twelve states would be required to ratify the Bill of Rights). After lengthy discussion, the House rejected the resolution proposed by the Committee regarding the

Bill of Rights and approved the Senate resolution regarding the proposed Eleventh Amendment's status (Annals of Congress, 6, p. 2284). The following day, February 25, 1797, the Senate reported receipt of a "message from the House of Representatives" informing the Senate that the House had passed "the resolution sent from the Senate for concurrence, for obtaining information relative to the amendment concerning the suability of States" (Annals of Congress, 6, p. 1559).

Of course, as the nation's Vice President, Adams had presided over the Senate and thus had been present when news of the various states' actions regarding the Eleventh Amendment had been forwarded to both the Senate and House by President Washington during the time period commencing November 21, 1794, with Washington's forwarding of New York's communication and ending January 29, 1796, with Washington's forwarding of communications received from Rhode Island and North Carolina. Adams' involvement as President, however, began with the 1797 resolution of Congress. Instead of appearing before Congress in person, President Adams first sent the following message to Congress, dated December 30, 1797, that was received and officially noted separately by the Senate and by the House on January 1, 1798:

*Gentlemen of the Senate, and  
Gentlemen of the House of Representatives:*

In compliance with the desire of the two Houses of Congress, expressed in their resolution of the 2d of March, 1797, that some speedy and effectual means might be adopted of obtaining information from the States of Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, Kentucky, Tennessee, and South Carolina, whether they have ratified the amendment proposed by Congress to the Constitution, concerning the suability of States, and, if they have, to obtain proper evidences; measures have been taken, and information and evidences obtained, the particulars of which will appear in the report from the Secretary of State, made by my direction, on the 28th day of this month, and now presented to the two Houses for their consideration. (Emphasis in original) (Annals of Congress, 7, pp. 481, 784-785)

The March 2nd date used by President Adams may refer to the date of adjournment by the Fourth Congress and possible date of transmission of the congressional request for information from the President regarding ratification of the Eleventh Amendment by the various states. It does not, however, refer to either the initial date of action by the Senate (January 31, 1797) or the concurring date of action by the House (February 25, 1797); see preceding discussion). On January 8, 1798, President Adams sent the following message to each congressional chamber:

*Gentlemen of the Senate, and  
Gentlemen of the House of Representatives:*

I have now an opportunity of transmitting to Congress a report of the Secretary of State, with a copy of an Act of the Legislature of the State of Kentucky, consenting to the ratification of the amendment of the Constitution of the United States, proposed by Congress in their resolution of the second day of December, 1793, relative to the suability of States. This amendment having been adopted by three-fourths of the several States, may now be declared to be a part of the Constitution of the United States. (Emphasis in original) (Annals of Congress, 7, pp. 483, 809; Richardson, I, p. 260)

Illustrative again of the haphazardness of the Eleventh Amendment's ratification process, President Adams recorded the wrong date for the resolution of Congress approving the submission of the Eleventh Amendment to the state legislatures. Instead of the March 4, 1793 date on which the House approved the Senate's version of the Amendment, President Adams listed the date of December 2, 1793, the date on which the Third Congress commenced its deliberations. However, no Senate action regarding the Eleventh Amendment was recorded on that date, such action not occurring until January 2, 1794 (Annals of Congress, 4, pp. 10, 25). The positive actions taken to approve the Eleventh Amendment by state legislatures in Connecticut, Maryland, Virginia, and South Carolina were never directly communicated to Congress, having gotten lost in the shuffle and lumped together with the general statement, offered without supporting evidence by President Adams: "This amendment having been

adopted by three-fourths of the several States, may now be declared to be a part of the Constitution of the United States” (Annals of Congress, 7, pp. 483, 809). Also lost in the shuffle was the refusal to ratify by New Jersey and Pennsylvania as well as the failure to act by the legislature of Tennessee (see Appendix V, n. 9 & n. 23).

### **Lawsuits serving as secondary catalysts for the eleventh amendment.**

The question begging discussion in the critical arena surrounding the Eleventh Amendment is, “What exactly was the situation in American jurisprudence regarding lawsuits against the states during the period under consideration?” A subsidiary question would be, “What role, if any, did such lawsuits play in the adoption of the Eleventh Amendment?” Lawsuits by individuals against other individuals challenging state actions as well as legal actions against the states themselves fell into three broad categories. First were claims for payment against the state, of which *Chisholm* provided an example. Other examples included *Vanstophorst v. Maryland* (1791), *Oswald v. New York* (1793), and *Cutting v. South Carolina* (1796) (For case information, see Appendix Y). It should be noted that none of the suits suggested “a picture of general fiscal irresponsibility on the part of the defendant [states]” as the lawsuits were arguments about payments for services and were not about “public securities, paper, or loan certificates issued by a state” (Jacobs, p. 70). Furthermore, it should be remembered, Hamilton’s plan for the federal government to assume responsibility for the states’ war debts had already been enacted by Congress (see preceding pp. 291-295 of this paper).

Next, but potentially both more embarrassing and troubling, were the lawsuits that subjected the state’s disposition of public lands to judicial scrutiny. These suits accumulated additional names as they made their way through the judicial system. *Grayson v. Virginia* (1792), a.k.a. *Hollingsworth v. Virginia*, a.k.a. *Indiana Company v. Virginia* provided one



example, while *Moultrie v. Georgia* (1797), a.k.a. *Huger v. Georgia*, provided yet another example (for case information, see Appendix Y). Such suits resurrected the Anti-Federalist arguments made against the newly proposed Constitution in the state ratifying conventions, one of the most articulate of which had been George Mason's remarks before the Virginia ratifying convention, when he stated:

Let gentlemen look at the westward. Claims respecting those lands, every liquidated account, or other claim against this state, will be tried before the federal court. Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? (Gibbons, p. 1904)

Closely linked with the western lands issue in Anti-Federalist arguments was the fear of absorption of the state courts by the federal judiciary, the term used being consolidation.

Immediately following the *Chisholm* decision, a Philadelphia newspaper wrote:

It must excite serious ideas in those who have from the beginning been inclined to suspect that the absorption of the State governments has long been a matter determined on by certain influential characters in this country who are aiming gradually at monarchy. (Mathis, 1968, p. 224)

The newspaper article, printed in the nation's capital, continued:

Federal jurisprudence has aimed a blow at the sovereignty of the individual States, and the late decision of the Supreme tribunal of the Union has placed the ridgepole on the wide-extended fabrick [sic] of consolidation. The representatives of the free citizens of the independent States will, no doubt, cherish the spirit of investigation and remonstrate on this subject with wisdom and firmness. (Mathis, 1968, p. 224)

As one legal scholar who focused on the Eleventh Amendment noted, "Judicial inquiry into state policies respecting the disposition of public lands promised to open a Pandora's box" (Jacobs, p. 70).

The third category of lawsuits, even more explosive than the conjunction of western lands and absorption because it touched nerves still raw from the Revolution against Great Britain, involved challenges to actions against Tory estates that had been authorized by the state

legislatures. These included *Rutgers v. Waddington* (1784), *Vassal v. Massachusetts* (1793), *Ware v. Hylton* (1796), and another suit that began as a two-party suit between individuals, *Brailsford v. Spalding* (1792), but evolved into a suit involving the state, *Georgia v. Brailford* (1794) (For case information, see Appendix Y). The raw wounds of war and the spectre of Loyalist vengeance in the form of lawsuits were partially responsible for the outburst of anti-judicial sentiment following the Court's *Chisholm* decision. One newspaper discussed the "numerous prosecutions that will immediately issue from the various claims of refugees, Tories, etc., that will introduce such a series of litigations as will throw every State in the Union into the greatest confusion (Warren, p. 99, n. 1). Another newspaper article concluded:

Nothing remains but to give the key of our treasury to the agents of the refugees, Tories and men who were inimical to our Revolution, to distribute the hard money now deposited in that office to persons of this description.  
(Warren, p. 99, n. 1)

As one legal historian described the situation, "[I]n Congress, as well as in the state legislatures, there was strong opposition to recognition of any liability to reimburse British creditors or to make restitution for the seizure of Loyalist property" (Jacobs, p. 70). As he further observed:

In fact, this was the transcendent political issue of 1794 and 1795, when the Eleventh Amendment was under active consideration, as provisions of the Jay Treaty clarifying the rights of Loyalists came under attack in Congress and throughout the country. (Jacobs, pp. 70-71)

For a variety of reasons and in somewhat confused fashion, a portion of the doctrine of sovereign immunity became embedded in the Constitution of the United States, thus weakening in some degree the country's response to Aristotle's ancient question. Sovereign immunity tainted the nation's response in favor of a government of laws by inserting a critical portion that favored a government of men who could not be held accountable before the law for their actions (see previous discussion regarding the doctrine of sovereign immunity).

## Case Law of the Eleventh Amendment

### **The eleventh amendment prior to 1960.**

*Hans v. Louisiana, 134 U.S. 1 (1890).*

*Facts & procedural history.*

Following the Civil War, the State of Louisiana adopted a new constitution in 1868. In January, 1874, Louisiana issued bonds, several of which Hans purchased. The payments on the bonds by Louisiana to Hans were to commence in January, 1880. The same year the bonds were issued, 1874, Louisiana amended its constitution to read:

The issue of consolidated bonds, authorized by the general assembly of the State at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in nowise impair.... To secure such levy, collection and payment the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until said bonds shall be paid, principal and interest... (p. 2)

Instead of using the taxes collected to make payments on the bonds, however, Louisiana “unlawfully and wrongfully diverted the money so collected, and appropriated the same to payment of the general expenses of the State” (p. 3). To legalize this maneuver, the State of Louisiana had again amended its constitution in 1879, the year prior to the first bond payments coming due, to read that the first payments due in 1880 were “remitted” and that the “taxes collected to meet said coupons are hereby transferred to defray the expenses of the state government” (p. 2).

Hans commenced legal action in the U.S. Circuit Court for the Eastern District of Louisiana to force the State of Louisiana to pay the value of the bonds he held. Hans argued that the amended constitution of 1879 violated the contract Louisiana had formed with the purchasers of the state’s bonds; Hans further argued that the state’s action violated Article I, § 10 of the U.S.

Constitution regarding the prohibition against states enacting laws “impairing the Obligation of Contracts” (Article I, § 10). After being served a citation, Louisiana’s Attorney General “filed an exception” on behalf of the state (p. 3). The grounds for Louisiana’s exception to the legal action filed by Hans were “that this court [the federal Circuit Court for the Eastern District of Louisiana] is without jurisdiction *ratione personae*” (Emphasis in original) (p. 3). Louisiana’s Attorney General further stated, “Plaintiff cannot sue the state without its permission; the constitution and laws do not give this honorable court jurisdiction of a suit against the state, and its jurisdiction is respectfully declined” (p. 3).

The U.S. Circuit Court for the Eastern District of Louisiana sustained the exception and dismissed the lawsuit filed by Hans. Whereupon Hans filed an appeal to the U.S. Supreme Court which, in turn, issued a “writ of error” to hear the case (p. 4).

*Legal question.*

As articulated by the Court:

The question is presented, whether a State can be sued in a Circuit Court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States. (p. 9)

*Legal reasoning of opposing parties.*

Arguing from the literal text of the Eleventh Amendment, Hans’ legal counsel contended that suits against states were prohibited only when they were filed by citizens of another state or by citizens of a foreign nation. Attorneys for Hans further argued that the current case fell within the description of the nation’s judicial power as articulated in Article III, § 2 of the U.S. Constitution. Regarding the claim by Louisiana that “because of its sovereignty it is excepted from the operation of this general grant of judicial power,” Hans’ attorneys declared, “There is

no warrant for the proposition either in the history of the constitution or in its judicial interpretation” (p. 4).

Focusing on the original issue of the bonds and the State of Louisiana’s Constitution of 1874, Hans’ legal counsel argued that the bonds constituted a contract between the State of Louisiana and Hans, and that any interference with such contract was prohibited by Article I, § 10 of the U.S. Constitution. Furthermore, Hans’ attorneys pointed out, both the original legislation creating the bonds and the State’s Constitution of 1874 formal enshrinement of the bonds as a contract contained language giving Louisiana’s permission for a lawsuit through inclusion of the provision for judicial enforcement of the collection of taxes and payment of the bonds’ principal and interest. Furthermore, the Supreme Court of Louisiana’s previous ruling in another case whereby the State High Court held that Louisiana’s consent to suit by “the constitutional amendment of 1874” had been “repealed by the Constitution of 1879” constituted an error that needed to be corrected by the U.S. Supreme Court (p. 7).

The Supreme Court of Louisiana assumed, that, although the Constitution of the United States prohibited the State from passing any law impairing the validity of a contract, the State by the adoption of a constitution could avoid that prohibition. The court overlooked the numerous decisions of this court [the U.S. Supreme Court] declaring that provision of the Constitution to be directed as well against impairing the obligation of a contract by constitutional amendment as by legislative authority; that in the meaning of the prohibition a constitution is a law. (p. 8)

Beyond reporting the State of Louisiana’s argument to the lower federal court regarding immunity from suit by reason of its sovereignty as recognized by the Eleventh Amendment, the Court’s report of the case did not detail argument made by the defendant State of Louisiana.

*Holding & disposition.*

The Court affirmed the ruling of the lower court, holding that a “State cannot, without its consent, be sued in a Circuit Court of the United States by one of its own citizens, upon a

suggestion that the case is one that arises under the Constitution and laws of the United States” (p. 1).

*Court’s rationale.*

All nine justices concurred in the verdict of the case. One justice, however, did not concur with the reasoning employed by the other eight justices. Justice Bradley, the same justice who authored the notorious opinion in the *Civil Rights Cases* narrowing the scope of the Fourteenth Amendment, being also the same justice who cast the deciding vote for Hayes in the 1876 presidential election by which means the South escaped from the constraints of Reconstruction in its treatment of black people and its commitment to public education, authored and delivered the Court’s opinion in *Hans v. Louisiana*, an opinion that expanded the Eleventh Amendment, thus freeing “most other southern states from legal accountability” (Hall, 1992, p. 82).

The fact that the text of the Eleventh Amendment didn’t specifically mention the situation of Hans, that of being a citizen of the state being sued, was an obstacle to be overcome by the Court. It was overcome by means not agreeable to the sole justice who agreed with the outcome, but did not agree with the arguments chosen by Bradley to get there. Justice Bradley arrived at the Court’s chosen destination by means of denigrating the Court’s decision in *Chisholm v. Georgia*, a case argued and decided well before he was born. Justice Bradley arrived at the end sought by the Court by means of treating remarks made in *The Federalist* and remarks made at the Virginia ratifying convention as more authoritative than the actual text of the Eleventh Amendment. Justice Bradley arrived at the Court’s verdict by elevating the views of a dissenting justice in *Chisholm v. Georgia* over the expressed judicial views of a greater jurist, Chief Justice John Marshall.

Simultaneously denigrating the verdict in *Chisholm v. Georgia* and elevating the views of Justice Iredell's dissenting opinion in that case served Justice Bradley's purpose of building a circumstantial case grounded in an ancient concept, that of sovereign immunity, although it has been shown previously in this chapter how that concept grew to its present form, a form having more in common with the needs of despotic rule than democratic rule in a constitutional republic, through a distortion of the original meaning. Justice Bradley began building his circumstantial case by recounting the case law of the Eleventh Amendment, a case law built upon a literal reading of the Eleventh Amendment. Then, after briefly referring to *Chisholm v. Georgia* as the case which precipitated the Eleventh Amendment, Justice Bradley emphasized the emotional reaction to that decision, stating that it

created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. (p. 11)

Justice Bradley also called attention to the immediate effect of the Eleventh Amendment, pointing out that that the "amendment ... actually reversed the decision of the Supreme Court [in *Chisholm v. Georgia*]" (p. 11). Ignoring the fact that the Court's decision in *Chisholm v. Georgia* was based on the Constitution as it read PRIOR to the adoption of the Eleventh Amendment, Bradley opined that the fault of the previous justices in *Chisholm v. Georgia* lay in the fact that they "were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage" (p. 12). All, perhaps, except Justice Iredell. Upon Justice Iredell's dissenting opinion, then, fixed Justice Bradley, who proceeded to elevate Iredell above his fellow justices in *Chisholm*.

Bradley next highlighted remarks made by Alexander Hamilton in number 81 of *The Federalist* whereby Hamilton addressed the argument against ratification of the new Constitution

on the grounds of citizens that the Constitution would permit lawsuits by citizens of one state against the government of another state. In other words, the portion of *The Federalist* in which Hamilton countered the argument against the Constitution's ratification by presenting the doctrine of sovereign immunity. The target of the argument against ratification was Article III, § 2 addressing the federal judicial authority, a target once again hit upon in the Virginia convention to ratify the Constitution by Anti-Federalists. James Madison and John Marshall countered the arguments of Patrick Henry and George Mason by restating the doctrine of sovereign immunity in common language.

Observing that the idea of the "suability of a State without its consent was a thing unknown to the law" after postulating that "the cognizance of suits and actions unknown to the law, and forbidden by the law was not contemplated by the Constitution when establishing the judicial power of the United States," Justice Bradley once again discussed the case law of the Eleventh Amendment, not mentioning, of course, that the case law he discussed had been built by a close reading of the text of the Eleventh Amendment. The case law discussion as conducted by Bradley helped the Court focus attention upon the doctrine of sovereign immunity, not upon a close reading of the text of the Eleventh Amendment and most definitely not upon an application of a literal reading of the Constitution as amended to the facts of the case at hand.

While as a private citizen engaged in legal practice, Marshall offered views in favor of sovereign immunity at the Virginia ratifying convention, when called to rule upon the subject as a Chief Justice of the Supreme Court, Marshall's views changed. In *Cohen v. Virginia*, Chief Justice Marshall's opinion included an observation regarding a writ of error issued by the Supreme Court involving "a State [as] a defendant in error" (p. 19). His remarks included a close reading of the language of the Eleventh Amendment and the observation that the Court's



jurisdiction “was governed by the general grant of judicial power [in Article III], as extending ‘to all cases arising under the Constitution or laws of the United States, without respect to parties’” outside of the two exceptions contained in the Eleventh Amendment when a suit was commenced against a state by “‘a citizen of another State’ or ‘of any foreign state’” (p. 20).

Bradley countered this embarrassing fact raised by attorneys for Hans by arguing the following:

It must be conceded that the last observation of the Chief Justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extra judicial*, and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion. (p. 20)

Justice Bradley began to conclude his arguments by noting that “the State cannot be compelled by suit to perform its contracts,” that “the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued” (p. 20). Bradley concluded that the doctrine of sovereign immunity required legislative judgment, “not the courts” (p. 21). According to Bradley:

But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause. (p. 21)

With the decision in *Hans*, the Court re-cast the Eleventh Amendment as prohibiting any lawsuits against the states by citizens anywhere, whether they reside in a differing state, in a foreign country, or in the same state. *Hans* represents the triumph of the doctrine of sovereign immunity for the state governments. Subsequent legal cases would carve out exceptions to that idea, particularly when state sovereignty collided with the plenary powers of Congress as enumerated in Article I, § 8 of the Constitution and in § 5 of the Fourteenth Amendment.

*Concurring/dissenting opinions.*

Justice John Marshall Harlan concurred with the Court's holding, but not with any of its reasoning. Justice Harlan took particular exception to Justice Bradley's characterization of the Court's decision in *Chisholm v. Georgia*, rightly noting that "the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was [prior to the adoption of the Eleventh Amendment]" (p. 21). In addition, there were other things said in the opinion with which Justice John Marshall Harlan did not agree – "But I cannot give my assent to many things said in the opinion" – however, he provided no additional clarification (p. 21).

***Ex Parte Young, 209 U.S. 123 (1908).***

*Facts & procedural history.*

This case began with Minnesota's attempts to reign in the power of the railroads and their unfair practices in setting rates, a problem that had long been targeted by the Grange, by Populists, and by their successors, the Progressives. Each of these political movements enjoyed strong support in Minnesota. In fact, Minnesotans played key roles in both the Grange and the Populist movements. Oliver Hudson Kelley, one of the original founders of the Grange as a fraternal order for southern farmers and originally from Minnesota, returned to Minnesota to help organize farmers into granges, a movement which became an agricultural force in the Midwest in organizing resistance to what was deemed to be unfair business practices by the railroads.

Another Minnesotan, Ignatius Donnelly, authored the preamble of the 1892 Populist party's Omaha platform, a document which reads:

We meet in the midst of a nation brought to the verge of moral, political, and material ruin. Corruption dominates the ballot-box, the legislatures, the Congress, and even touches the ermine of the bench... The newspapers are largely subsidized or muzzled; public opinion silenced; business prostrated; our homes covered with mortgages; labour [sic] impoverished; and the land concentrating in the hands of the capitalists.... The fruits of the toil of millions are boldly stolen to build up colossal fortunes for a few, unprecedented in the history of mankind; and the possessors of these, in

turn, despise the republic and endanger liberty. From the same prolific womb of governmental injustice we breed the two great classes – tramps and millionaires. (Brogan, p. 439)

Four years later, the Populists had captured the Democratic Party at their convention in Chicago (Beard, Beard, & Beard, p. 315). A decade later their spirit reigned supreme in the legislature of the State of Minnesota.

In order to combat what was perceived by the public as dictatorial powers exercised by the railroads in setting their rates for a public function, that of transporting people and goods, the Minnesota legislature enacted legislation creating a railroad and warehouse commission whose purpose was to set the rates railroads could charge for transporting freight between the various railroad stations in Minnesota. The commission issued its first order regarding rates in September, 1906, an order with which the railroad companies complied even though the new rates “materially reduced [the rates] then existing” (p. 127).

At the same time the Minnesota legislature passed legislation setting penalties for disobedience to the rates set by the state commission. Both individuals working for the railroads as well as the railroads themselves could be charged for any violations of the state commission’s provisions. Individuals “shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than twenty-five hundred dollars, nor more than five thousand dollars for the first offense” (p. 127). Individuals foolhardy enough to commit a second violation were to be fined “not less than five thousand dollars nor more than ten thousand dollars for each subsequent offense” (p. 127). Corporations were subjected to the same schedule of penalties, which were “to be recovered in a civil action” as opposed to criminal action taken against individuals (p. 127).

Having used the state commission to set rates for the hauling of freight in Minnesota, in April, 1907, the legislature of the State of Minnesota next passed a statute setting a “maximum passenger rate to be charged by railroads in Minnesota,” a rate which dropped the rate from three cents to two cents per mile (p. 127). The same act also provided the following penalties for violating the act setting the maximum passenger rates.

Any railroad company, or any officer, agent or representative thereof, who shall violate any provision of this act shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not exceeding five thousand (5,000) dollars, or by imprisonment in the State prison for a period not exceeding five (5) years, or both such fine and imprisonment. (p. 128)

Again, the railroad companies and their employees complied with the requirements of the new law regarding passenger rates.

Subsequently the Minnesota legislature enacted legislation covering rates for freight items not included in the initial order of the state commission. In addition the new legislation divided these commodities into seven classes and established maximum rates for each commodity classification.

The railroad companies did not comply with the provisions of this later act. Instead, one day before the act was scheduled to take effect, “nine suites in equity were commenced in the Circuit Court of the United States for the District of Minnesota, Third Division” (p. 129). Each suit was “brought by stockholders of the particular railroad mentioned in the bill [setting the new rates for the various commodity classifications]” (p. 129). Each lawsuit named the following as defendants: the railroad of which the complainants were stockholders, “the members of the Railroad and Warehouse Commission, and the Attorney General of the State, Edward T. Young, and individual defendants representing the shippers of freight upon the railroad” (p. 129).

The purpose of each lawsuit was to obtain an injunction preventing the railroad company from complying with the requirements of any of the afore-mentioned acts of the Minnesota legislature and any orders issued by the Railroad and Warehouse Commission. Basing their claims upon the Fourteenth Amendment, each suit alleged that the reduced “tariffs and charges” were

unjust, unreasonable and confiscatory, in that they each ... would ... deprive complainants [the shareholders] and the railway company of their property without due process of law, and deprive them and it of the equal protection of the laws, contrary to and in violation of the Constitution of the United States and the amendments thereof. (p. 130)

Each of the suits also stated that the penalties “prescribed” for violations of any of the Commission’s orders and the legislative acts were

so drastic that no owner or operator of a railway property could invoke the jurisdiction of any court to test the validity thereof, except at the risk of confiscation of its property, and the imprisonment for long terms in jails and penitentiaries of its officers, agents and employés [sic]. (p. 131)

Due to the “drastic” or Draconian nature of the penalties prescribed for violation of any of the orders and state laws, the attorneys for the shareholders contended in each of the nine suits, “each of them [the acts and orders] was ... unconstitutional” because each “denied to the defendant railway company and its stockholders ... the equal protection of the laws, and deprived it and them [the shareholders] of their property without due process of law” (p. 131).

The U.S. Circuit Court for the District of Minnesota issued a temporary restraining order, “which only restrained the railway company from publishing the rates as provided [for in the latest act that had not been complied with] ... and from reducing its tariffs to the figures set forth [in the latest act]” (p. 132). The Circuit Court refused to issue an injunction against the previous orders of the Commission and acts of the Minnesota legislature as the railway companies had already complied with their provisions. The U.S. Circuit Court for the District of Minnesota also

issued an injunction restraining “Edward T. Young, Attorney General, from taking any steps against the railroads to enforce the remedies or penalties specified in the act” (p. 132).

Appearing before the federal court, Attorney General Young requested the court to dismiss the action against him since “the court had no jurisdiction over him as Attorney General” because, Minnesota having not consented to any suit against itself, the legal action filed by the shareholders was “contrary to the Eleventh Amendment of the Constitution of the United States” (p. 132).

Following “a hearing of all parties and taking proofs in regard to the issues raised,” the U.S. Circuit Court for the District of Minnesota issued another injunction “against the railway company, restraining it, pending the final hearing of the cause, from putting into effect the tariffs, rates, or charges set forth in the act” (p. 132).

The court also enjoined the defendant Young, as Attorney General of the State of Minnesota, pending the final hearing of the cause, from taking or instituting any action or proceeding to enforce the penalties and remedies specified in the act above mentioned, or to compel obedience to that act, or compliance therewith, or any part thereof. (p. 132)

Immediately on the following day, Attorney General Young filed action in Minnesota state court to have a writ of mandamus “issued and served upon the Northern Pacific Railway Company, commanding the company” to comply with the latest act (pp. 133-134). Whereupon the U.S. Circuit Court for the District of Minnesota “ordered Mr. Young to show cause why he should not be punished ... for ... contempt for ... violating the temporary injunction issued by that court” (p. 134). Appearing before the federal court, the Minnesota Attorney General repeated his earlier arguments based on the Eleventh Amendment, following which the U.S. Circuit Court for the District of Minnesota judged him to be in contempt and ordered the U.S. Marshall for the District of Minnesota, Third Division, to be taken into federal custody until the Minnesota

Attorney General “dismiss the mandamus proceedings brought by him ... in the Circuit Court of the State” and until he paid a fine of \$100 (p. 126).

Following this sequence of events,

[a]n original application was made to this court [the U.S. Supreme Court] for leave to file a petition for writs of *habeas corpus* and certiorari in behalf of Edward T. Young, petitioner, as Attorney General of the State of Minnesota. (Emphasis in original) (p. 127)

Whereupon the U.S. Supreme Court issued an order to the federal marshal detaining the Minnesota Attorney General “to show cause why such petition [for writs of *habeas corpus* and certiorari] should not be granted” (Emphasis in original) (p. 126). The U.S. Marshal for the District of Minnesota, Third Division

justified his detention of the petitioner [the Minnesota Attorney General] by virtue of an order of the Circuit Court of the United States for the District of Minnesota, which adjudge the petitioner guilty of contempt of that court and directed ... that he should stand committed to the custody of the marshal until that order was obeyed. (p. 126)

The U.S. Supreme Court then issued a writ of certiorari to review the case and make a final disposition regarding the issue(s) under dispute.

*Legal questions.*

Are there federal questions involved which would give the federal Circuit Court for the District of Minnesota jurisdiction of the case? Do the penalties contained within the orders of the Minnesota Railroad and Warehouse Commission and within the acts of the legislature for the State of Minnesota violate the due process and equal protection provisions of the Fourteenth Amendment? Does the injunction issued by the federal Circuit Court for the District of Minnesota against the Minnesota Attorney General constitute a suit against the State of Minnesota in violation of the provisions of the Eleventh Amendment?

*Legal reasoning of opposing parties.*

Edward T. Young, Attorney General for the State of Minnesota, along with the Attorney General for the State of Missouri and four other attorneys presented arguments before the Court based upon the Eleventh Amendment. They first argued that the state orders and laws regulating railroad rates “did not present a question involving the construction of the Constitution of the United States,” but instead involved “a question of fact only” (p. 135) The Court’s report summarizing their main contentions follows:

The Circuit Court exceeded its power and authority in making its order that the petitioner be enjoined as Attorney General from taking appropriate legal proceedings to compel the railway companies to comply with the act of April 18, 1907. (p. 136)

They continued:

The suit in the Circuit Court against the Attorney General was in effect a suit against the State of Minnesota. The immunity of a State from suit, as provided by the Eleventh Amendment, is not dependent upon any pecuniary interest, as contended by respondents. (p. 138)

Ten attorneys represented the shareholders who originally initiated the first legal proceedings of the case. One wonders who paid their fees. These attorneys proceeded to argue the case on Fourteenth Amendment grounds. According to the Court’s summary:

The case involves a Federal question sufficient to sustain jurisdiction upon that ground alone. The penalty provisions of the law attacked are violative of the Fourteenth Amendment.... The rates fixed are confiscatory and the legislation is therefore unconstitutional and void under the Fourteenth Amendment. (p. 140)

Regarding the State of Minnesota’s Eleventh Amendment arguments, attorneys for the shareholders [and the railroads?] argued that “the Eleventh Amendment should not be given a construction which would tend to impair the full efficacy of the protecting clauses of the Fourteenth Amendment” (p. 141). After pointing to the critical role played by courts of equity,



most particularly “the Circuit Courts of the United States,” in offering protection against unconstitutional laws, the team of attorneys concluded (p. 141):

If it shall be held that a state statute may be so adroitly framed that the Eleventh Amendment will bar any suit in the Federal courts of equity jurisdiction, then no corporation nor individual will dare assume the risk of the savage punishments which may be inflicted under such acts, and legislation which flagrantly violates the provisions of the Fourteenth Amendment will be made operative for all practical purposes. (pp. 141-142)

*Holding & disposition.*

In *Ex parte Young*, the Court held “that the Circuit Court had jurisdiction in the case before it, because it involved the decision of Federal questions arising under the Constitution of the United States” (p. 145). The Court further held

that the provisions of the acts relating to the enforcement of the rates ... by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves are unconstitutional on their face... (p. 148)

Note that the Court’s holding did not directly reference either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. While the text of the actual decision didn’t reference the two clauses of the Fourteenth Amendment, the syllabus of the case did in presenting the jurisdictional holding of the case. According to the syllabus, the portion of the Court’s report immediately preceding the discussion of *Ex parte Young*:

Whether a state statute is unconstitutional because the penalties for its violation are so enormous that persons affected thereby are prevented from resorting to the courts for the purpose of determining the validity of the statute and are thereby denied the equal protection of the law and their property rendered liable to be taken without due process of law, is a Federal question and gives the Circuit Court jurisdiction. (p. 124).

Regarding the Eleventh Amendment question, the Court held as follows:

The attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the State in its sovereign or governmental capacity, and is an illegal act and the officer is

stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to its officer immunity from responsibility to the supreme authority of the United States. (p. 124)

*Court's rationale.*

In *Ex parte Young*, Justice Peckham delivered the 8-1 decision of the Court, a bench that included the notable jurist, Oliver Wendell Holmes, who was serving his fifth term on the Court; the bench also included the notable dissenter, Justice John Marshall Harlan. Quickly moving to the issue of whether or not a federal question was involved, the Court noted and discussed the presence of multiple federal questions centered on the intersection between Minnesota's legislation and the clauses of the Fourteenth Amendment. Following its review of the issue regarding the presence of federal questions, the Court announced its first holding whereby "the Circuit Court had jurisdiction in the case before it" (p. 145).

The Court next moved to the contentions regarding the constitutionality of the State of Minnesota's orders via a state commission and Minnesota's legislative acts. Beginning with a review of case law regarding extreme penalties and their effect upon making legislation "conclusive" in terms of not being challengeable in practical terms, the Court noted points of law and then reached its holding that the Minnesota acts were "unconstitutional" because of the "provisions of the acts relating to the enforcement of the rates, either for freight or passengers" (p. 148). Next moving to the question regarding the rates, the Court pointed to the Circuit Court's initial finding that the rates fixed by order and statute "were not sufficient to be compensatory, and were in fact confiscatory, and the act was therefore unconstitutional," or at least enough unconstitutional to justify an injunction pending a "final hearing" (pp. 149, 132).

The Court finally addressed the competing constitutional claims of the Eleventh and Fourteenth Amendments. However, it did not do so in a direct manner. Instead, having found

the state acts unconstitutional by virtue of their violations of the Fourteenth Amendment, the Court reframed the issue in the following terms:

We have, therefore, upon this record the case of an unconstitutional act of the state legislature and an intention by the Attorney General of the State to endeavor to enforce its provisions, to the injury of the company, in compelling it, at great expense, to defend legal proceedings of a complicated and unusual character... (p. 149)

Having found that the federal courts had jurisdiction by virtue of federal questions being involved, having subsequently investigated the federal questions and found state laws to be unconstitutional as violative of the Fourteenth Amendment, the Court could duck the Eleventh Amendment issue through the stratagem of ruling that state employees are stripped of state sovereignty when they try to enforce unconstitutional laws, thus rendering the Eleventh Amendment claim moot.

At the time the Court's decision in *Ex parte Young* was most unpopular. Previously, the same Court with the same justice authoring the Court's opinion had invalidated New York's regulation of the hours of labor in *Lochner v. New York*, 198 U.S. 45 (1905). Now, in *Ex parte Young* the Court had once again "sided with the monied interests against the public" (Hall, 1992, p. 949). However, both Justice Harlan and Justice Holmes had dissented in the *Lochner* decision, swimming upstream against the corporate interests who viewed such regulation as an unwarranted intrusion by the government into the marketplace, a hallowed place where ideas of social Darwinism and laissez-faire economics ran rampant.

*Concurring/dissenting opinions.*

Justice John Marshall Harlan dissented, arguing that the Court's decision would "practically obliterate the Eleventh Amendment and place the States, in vital particulars, as absolutely under the control of the subordinate Federal courts, as if they were capable of being

directly sued” (p. 204). Justice Oliver Wendell Holmes saw it differently. “[T]he Union would be imperiled’ if the Supreme Court could not declare unconstitutional the laws of the several states. The power to enjoin state officers from violating federal law seems a necessary adjunct to that ability” (Hall, 1992, p. 949).

**The eleventh amendment since 1960.**

***Parden v. Terminal Railroad Company, 377 U.S. 184 (1964).***

*Case summary.*

Officially designated *Parden et al. v. Terminal Railway of the Alabama State Docks Department et al.*, the facts of the case involved a collision between a state-owned-and-operated railroad engaged in interstate commerce, workers for that state-owned-and-operated railway, and the Federal Employers’ Liability Act. Workers, all of them citizens of the State of Alabama who had been injured as employees of the Terminal Railway of the Alabama State Docks Department, filed suit in the Federal District Court for the Southern District of Alabama. The injured workers sought damages for their injuries under the Federal Employers’ Liability Act. The State of Alabama, appearing as the defendant in the case, “moved to dismiss the action on the ground that the Railway was an agency of the State and the State had not waived its sovereign immunity from suit” as provided by the Eleventh Amendment (p. 185). The Federal District Court for the Southern District of Alabama granted the state’s motion for dismissal on Eleventh Amendment grounds. Upon appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed the district court’s ruling. Upon further appeal, the U.S. Supreme Court “granted certiorari” to review the case and make a final disposition of the legal issues involved in the dispute (p. 185).

The legal question before the Court was stated by Justice Brennan:

The question in this case is whether a State that owns and operates a railroad in interstate commerce may successfully plead sovereign immunity in a federal-court suit brought against the railroad by its employee under the Federal Employers' Liability Act. (p. 184)

Two additional questions arose from consideration of the question just presented. According to Justice Brennan:

Here, for the first time in this Court, a State's claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress. Two questions are thus presented: (1) Did Congress in enacting the FELA intend to subject a State to suit in these circumstances? (2) Did it have the power to do so, as against the State's claim of immunity? (p. 187)

As may be surmised from the foregoing account, Justice Brennan, described by one legal source as "Warren's theoretician and technician" who framed "the judicial arguments to carry out Warren's strategy" as the two justices served as each other's "closest confidant[s] and chief all[ies]," authored and announced the Court's 5-4 decision by which the Supreme Court reversed the decisions of the federal district and circuit courts (Hall, 1992, p. 914). In addition to Justice Brennan, the other majority justices were Chief Justice Warren and Justices Black, Clark, and Goldberg. Justice White wrote a dissenting opinion, which was joined by Justices Douglas, Harlan [Justice John Marshall Harlan's grandson, a more conservative jurist than his grandfather, possibly arising from his affinity for the wealthy and powerful as evidenced by his extensive corporate attorney experience prior to joining the Court], and Stewart.

Beginning with the declaration, "We think that Congress, in making the FELA applicable to 'every' common carrier by railroad in interstate commerce, meant what it said," the Court next commenced a review of the Court's case law by noting, "That congressional statutes regulating railroads in interstate commerce apply to such railroads whether they are state owned or privately owned is hardly a novel proposition; it has twice been clearly affirmed by this Court" (pp. 187,

187-188). Justice Brennan also pointed out that “the precise question presented by the instant case” had all been addressed by lower courts which each “held that the FELA did authorize suit against a publicly owned railroad despite a claim of sovereign immunity” (p. 189).

Addressing the conflict between the Eleventh Amendment and congressional action based upon the Constitution’s grant of plenary power to regulate commerce, the Court began:

Respondents [the State of Alabama] contend that Congress is without power, in view of the immunity doctrine, thus to subject a State to suit. We disagree. Congress enacted FELA in the exercise of its constitutional power to regulate commerce... While a State’s immunity from suit by a citizen without its consent has been said to be rooted in “the inherent nature of sovereignty,” ... the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce. (pp. 190-191)

To drive the point home, Justice Brennan cited specifically from the Court’s “ruling in *United States v. California* ... [that] a State’s operation of a railroad in interstate commerce”

must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.... [T]here [sic] is no such limitation upon the plenary power to regulate commerce... (p. 191)

Explaining that the Court’s “[r]ecognition of the congressional power to render a State suable under the FELA” shouldn’t be construed to mean “that the immunity doctrine, as embodied in the Eleventh Amendment ... is here being overridden,” the Court continued:

It remains the law that a State may not be sued by an individual without its consent. Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act. By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act... (p. 192)

Couching the Court’s holding in terms of “this Nation’s federalism,” the Court further explained:

A State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court. But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation. (p. 196)

Justice White's dissenting opinion disagreed with the Court's interpretation of the impact of state ratification of the U.S. Constitution, that apparently the significance of a specific grant of power to the federal government did not necessarily withdraw such specified activity from a state's sovereignty which eliminated the possibility of the state submitting an Eleventh Amendment defense. The dissenting opinion did not view the grant of power by the states to the federal government to operate automatically as a waiver of its Eleventh Amendment immunity from legal action. In fact, the dissenting opinion downplayed the fact that Congress was exercising plenary authority over an activity that had been withdrawn by the states themselves from their own sphere of influence. Instead, the dissenting opinion attempted to maintain the focus on the Eleventh Amendment's requirement of intentional waiver of immunity as opposed to the real issue, the conflict between the Eleventh Amendment and Congress' plenary authority to legislate in those areas designated for federal activity by Article I, § 8 of the Constitution. According to the dissenting opinion:

If the automatic consequence of state operation of a railroad in interstate commerce is to be waiver of sovereign immunity, Congress' failure to bring home to the State the precise nature of its option makes impossible the "intentional relinquishment or abandonment of a known right or privilege" which must be shown before constitutional rights may be taken to have been waived. (p. 200)

*Significance for the eleventh amendment.*

The significance of this case resides in the Court's holding that states cannot use the Eleventh Amendment to shield itself from congressional exercise of its plenary authority to

regulate commerce as specifically granted by the states to Congress in Article I, § 8 of the U.S. Constitution, that the grants of power to Congress by the states in Article I, § 8 necessarily diminished state sovereignty in those areas. The issue regarding the intersection of Article I, § 8 and the Eleventh Amendment would be revisited, most particularly in *Pennsylvania v. Union Gas Company*, 491 U.S. 1 (1989) and in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

***Green v. Mansour*, 474 U.S. 64 (1985).**

*Case Summary.*

The facts of the case involve the congressional act entitled Aid to Families With Dependent Children (AFDC), the Director of the Michigan Department of Social Services (Mansour), “recipients of benefits under the federal” AFDC program, and a congressional amendment to the AFDC Act while the dispute was being litigated (p. 64). AFDC was described by Justice Brennan as a “matching benefits program by which “[s]tates pay up to 50 percent of their benefit payments, the Federal Government pays the remainder” (p. 77, n. 3) (Brennan, J., dissenting). Certain AFDC recipients filed two separate class action suits in the federal District Court for the Eastern District of Michigan naming Mansour, Director of the Michigan Department of Social Services, as the defendant. The combined complaint of the two class action suits

claimed that respondent’s [Mansour’s] policies of prohibiting the deduction of child care costs and requiring the inclusion of step-parents’ income for purposes of calculating earned income, thereby determining eligibility for and the amount of AFDC benefits, violated applicable federal law. (p. 64)

In actuality, one class action suit focused upon the claim regarding the deduction of child care costs while the other class action suit targeted the claim regarding step-parents’ income. In the class action suit focused upon step-parents’ income, the District Court “issued a preliminary



injunction preventing respondent [Mansour, the Director of the Michigan Department of Social Services] from enforcing its automatic inclusion policy” (p. 66).

While the two class-action disputes regarding calculations for eligibility and payments under AFDC were being legally debated before the U.S. District Court for the Eastern District of Michigan, Congress amended the AFDC Act “to expressly require States to deduct child care expenses and to include stepparents’ income” (p. 64). Following congressional amendment of the Aid to Families of Dependant Children Act, Mansour brought the policies of the Michigan Department of Social Services “into compliance” with the amended act” (p. 66). Subsequent to the congressional action’s stipulations regarding the requirement that step-parents’ income be included in the calculations of earned income, both “parties thereafter stipulated that the District Court should terminate its preliminary injunction as of the effective date of the amendment” (p. 66). As a result of the foregoing actions,

the District Court held that the changes in federal law rendered moot the claims for prospective relief, that the remaining claims for declaratory and “notice relief” related solely to past violations of federal law, and that such retrospective relief was barred by the Eleventh Amendment. (p. 64)

Upon “a consolidated appeal” to the next federal judicial level, the U.S. Court of Appeals for the Sixth Circuit affirmed the decision of the District Court for the Eastern District of Michigan (p. 64).

Before proceeding further, it is important to understand the various forms of relief sought by the plaintiffs and denied by the federal courts. “Prospective relief” refers to halting the alleged violations committed by the Michigan Department of Social Services under Mansour’s direction. As we saw in *Ex parte Young*, this took the form of an injunction being issued by the federal court barring further violations of federal law by a state official. In the current case,

*Green v. Mansour*, the state director's compliance with the AFDC Act as amended rendered moot the claim for "prospective relief."

The two other forms of relief, declaratory relief and notice relief, involved in the legal dispute are more complicated and rely for their definition upon previous case law. Since understanding these two forms of relief is critical to a full understanding of the federal court decisions and to an even fuller understanding of their place in the long chain of Eleventh Amendment litigation, time and space will be devoted to the explanation of and implications flowing from "declaratory relief" and "notice relief."

Declaratory relief is the issuance by a federal court of "a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law" (p. 67). Prior to 1934, declaratory relief was not traditionally available. As explained by one legal expert:

The traditional, restrictive view of the judicial process limited courts to active relief [as opposed to "passive relief that merely defines legal relations through declaratory judgments"]. Moreover, the U.S. Supreme Court, in *Willing v. Chicago Auditorium Association* (1928), implied that a special barrier to declaratory relief lay in the Constitution's limiting the federal judicial power [in Article III, § 2, cl. 1] to [current] cases and controversies. (Hall, 1992, p. 223)

The situation changed, however, in 1934 with the passage by Congress of the Declaratory Judgment Act. As explained by Justice Rehnquist in *Green v. Mansour*:

The Declaratory Judgment Act of 1934, 28 U.S.C. §2201, permits a federal court to declare the rights of a party whether or not further relief is or could be sought, and we have held that under this Act declaratory relief may be available even though an injunction is not. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). But we have also held that the declaratory judgment statute "is an enabling Act, which confers a discretion of the courts rather than an absolute right upon the litigant." *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237 241 (1952)

Turning to “notice relief,” the discussion will be somewhat lengthier due to the fact of its complicated judicial application. At the time of the opinion in *Green v. Mansour*, Justice Rehnquist stated in that opinion that the federal Circuit Courts were in substantial disagreement regarding the applicability of notice relief to legal disputes involving state violations of federal law. Actually, there was in fact substantial agreement among the Circuit Courts, 4-1, regarding the allowance of “notice relief” (p. 68). The disagreement actually was between the Rehnquist slim Court majority in *Green v. Mansour*, joined by the federal Court of Appeal for the Second Circuit, on the one hand, and, on the other hand, the federal Courts of Appeal for the Fourth, Fifth, Ninth, and Eleventh Circuits as well as the four dissenting Justices in *Green v. Mansour*. In this case, Rehnquist disapproved of the arguments for notice relief; however, in a previous decision, *Quern v. Jordan*, 440 U.S. 332 (1979), Rehnquist had approved of the same arguments for notice relief, a situation that will be treated more fully in the paragraphs devoted to dissenting opinions in *Green v. Mansour*. However, Rehnquist’s opinion in *Quern v. Jordan* as cited by Justice Brennan’s dissenting opinion in *Green v. Mansour* explain what is meant by “notice relief.” As explained by Rehnquist in *Green v. Mansour*, the case of *Quern v. Jordan* involved the improper denial of benefits by the State of Illinois to citizens who were eligible for those benefits under the federal Aid to the Aged, Blind, or Disabled (AABD) Act, an act designed as a “federal-state program” to be administered by the individual states. In Justice Rehnquist’s words:

The notice approved by the Court of Appeals [in *Quern v. Jordan* (1979)] simply apprises plaintiff class members of the existence of whatever administrative procedures may already be available under state law by which they may receive a determination of eligibility for past benefits.... [sic] The mere sending of that notice does not trigger the state administrative machinery. Whether a recipient of notice decides to take advantage of those available state procedures is left completely to the discretion of that particular class member; the federal court plays no role in

that decision. And whether or not the class member will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislature, not with the federal court. *Id.* [*Quern v. Jordan*, 440 U.S. 332 (1979)], at 347-348. (pp. 75-76) (Brennan, J., dissenting)

Further explanation of the legal concept, “notice relief,” was further provided by Justice Brennan in an explanation which included citations by both the Supreme Court and by the federal Court of Appeals for the Seventh Circuit. As explained by Justice Brennan in a footnote to his dissenting opinion in *Green v. Mansour*:

... the notice approved in *Quern v. Jordan*, 440 U.S., at 349, “inform[ed] [sic] class members that their federal suit [was] [sic] at an end, that the federal court [could] [sic] provide them with no further relief, and that there [were] [sic] existing state administrative procedures which they may wish to pursue.” The class members were “given no more ... [sic] than what they would have gathered by sitting in the courtroom.” *Ibid.*, quoting *Jordan v. Trainor*, 563 F. 2d 873, 877-878 (CA7 1977). And, of course, what class members would have gathered by sitting in the courtroom was the substantive outcome of the litigation – a declaration that Illinois officials had violated federal law. (p. 75, n. 1) (Brennan, J., dissenting)

To return to the legal procedures of the case at hand, *Green v. Mansour*, as discussed previously, the federal District Court for the Eastern District of Michigan had held in both class-action suits that questions of state violation of AFDC had been rendered moot because state officials were complying with the amended act. The District Court also held that petitions “for declaratory and notice relief related solely to past violations of federal law,” a fact the District Court interpreted as representing “retrospective relief” and were therefore “barred by the Eleventh Amendment” as originally argued by the State of Michigan (p. 67).

Upon “consolidated appeal” to the U.S. Court of Appeals for the Sixth Circuit, that court affirmed the decision of the lower federal court, agreeing with all aspects of that court’s decision. Further explanation was provided by the Supreme Court’s description of the legal proceedings:

It agreed that the changes in federal law rendered moot the claims for prospective relief. *Id.* [742 F. 2d 277 (1984)], at 281-283. It also agreed

that because the sought-after notice and declaratory relief was retrospective in nature, the relief was barred by *Edelman v. Jordan*, 415 U.S. 651 (1974). 742 F. 2d, at 286-288. It reasoned that when there is no prospective relief to which notice can be ancillary, even [relief notice] approved in *Quern v. Jordan* ... cannot escape the Eleventh Amendment bar. 742 F. 2d, at 287-288. Declaratory relief is similarly barred under such circumstances, it explained, because such relief could relate solely to past violations of federal law... (p. 67)

According to the Court's opinion, the Court

granted certiorari to resolve a conflict in the Circuits over whether federal courts may order the giving of notice of the sort approved in *Quern v. Jordan* [relief notice], *supra*, or issue a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law. (p. 67)

Justice Rehnquist announced the narrow 5-4 decision of the Court in *Green v. Mansour* which affirmed the original ruling of the District Court for the Eastern District of Michigan as well as the affirmation of that decision by the Court of Appeals for the Sixth Circuit. He was joined by Chief Justice Burger and by Justices O'Connor, Powell, and White. Justices Brennan, Marshall, Blackmun, and Stevens dissented. As provided by the Court's record:

Brennan, J., filed a dissenting opinion, in which Marshall, Blackmun, and Stevens, JJ., joined, *post*, p. 74. Marshall, J., filed a dissenting opinion, in which Brennan and Stevens, JJ., joined, *post*, p. 79. Blackmun, J., filed a dissenting opinion, in which Brennan, Marshall, and Stevens, JJ., joined, *post*, p. 81. (p. 65)

After presenting the facts and procedural history of the case, Justice Rehnquist attempted to explain why notice relief – which had been provided under circumstances quite similar to those in *Quern v. Jordan*, a case whose opinion had been authored by Rehnquist – was not available to petitioners in *Green v. Mansour*. Of course, the reader doesn't really find that out (the similarity of *Quern v. Jordan* and *Green v. Mansour*) until reading Justice Brennan's dissent as Rehnquist doesn't reveal that fact in his own opinion. In fact, instead of admitting the similarity, an admission that would have required a different holding by the Court regarding the

request for relief notice, Rehnquist attempted to put blame on the petitioners, claiming that “petitioners misconceive our Eleventh Amendment jurisprudence and our decision in *Quern*” (p. 69). At best, Rehnquist’s tactic was ill-conceived; at worst, it was unethical and dishonest. Rehnquist attempted, unconvincingly in light of Justice Brennan’s remarks which were joined by the other dissenting justices..., Rehnquist attempted..., Rehnquist attempted..., Rehnquist attempted to differentiate the two cases on the basis that it was not “ancillary to the grant of some other appropriate relief that can be noticed,” e.g., an injunction prohibiting further violation of the federal law in question (p. 71). On this basis, both notice relief and declaratory relief were both prohibited by the Eleventh Amendment. However, as Justice Brennan pointed out in his dissent, Rehnquist’s use of “ancillary” to distinguish between *Quern v. Jordan* and *Green v. Mansour* utilized faulty logic:

It is not enough to distinguish the cases [by observing] that the notice relief in *Quern* was “ancillary” to a prospective injunction because the “prospective” injunction had been moot for three years before the Court of Appeals fashioned the notice relief and for five years before this Court approved it – Congress abolished the federal program at issue in *Quern* in 1974 [which was five years before it reached the Court]. (p. 76, n. 2)

More specifically, Justice Brennan noted that the argument against notice and declarative relief posed by the State of Michigan was “identical in all significant respects” to the argument posed by the State of Illinois in *Quern v. Jordan*, an argument that had been rejected by Justice Rehnquist in writing the Court’s opinion in *Quern v. Jordan* [this was quoted previously in this paper’s discussion about notice relief]. Having previously rejected the argument that the Eleventh Amendment prohibited both notice and declarative relief, and having subsequently held that both types of relief were appropriate in *Quern*, Justice Brennan noted the inconsistency of Rehnquist’s position by declaring, “In the present case, the Court turns around and accepts the

argument made by the State of Illinois in *Quern* with respect to Green's request for declaratory relief" (p. 76). Justice Brennan then noted:

The Court fails to explain adequately why declaratory relief should be analyzed differently than notice relief was in *Quern*, since use of the declaratory judgment in the State's courts is also left completely to the discretion of individual notice recipients and the award of retroactive benefits "rests entirely with the State, its agencies, courts, and legislature, not with the federal court." *Quern, supra*, at 348. (p. 76)

To demonstrate the similarity of requests between the plaintiffs in *Green* and the plaintiffs in *Quern*, Justice Brennan described Green's request:

Green asked the District Court to order that notices be sent out to other AFDC recipients advising them of the outcome of the litigation, *i.e.*, of the declaratory judgment and telling them that state administrative proceedings might be available to them to obtain retroactive benefits. (p. 75, n. 1)

Justice Brennan's arguments regarding the Rehnquist-led decisions are convincing. They lend credence to an observation about Justice Rehnquist by several legal authorities. The observation as reported by one legal scholar: "Such apparent inconsistencies promoted the view that Rehnquist was unprincipled and result oriented and that he was using his position on the Court to achieve the goals of his own conservative political agenda" (Hall, 1992, p. 716).

Previously, Justice Brennan had identified what he believed to be the root cause of the Court's inconsistent Eleventh Amendment decisions, a reason rooted in the absence of text in the Eleventh Amendment supportive of previous decisions which prevented the development of a foundational rationale for the Court's holdings. As articulated by Justice Brennan:

... I explained at length my view that the Court's Eleventh Amendment doctrine "lacks a textual anchor [in the Constitution] [sic], a firm historical foundation, or a clear rationale." Today's decision demonstrates that the absence of a stable analytical structure underlying the Court's Eleventh Amendment jurisprudence produces inconsistent decisions. (p. 74)

The foregoing summarized and somewhat understated the extent of the analysis Justice Brennan formulated in his dissenting opinion in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985) in the Court's term immediately preceding the term in which *Green v. Mansour* was decided. Justice Brennan provided a fuller summarization of that dissent than what was just previously cited. According to Justice Brennan's introduction of that dissenting analysis:

As I demonstrated in *Atascadero*, *supra*, the Court's constitutional doctrine of the sovereign immunity of States rests on a mistaken historical premise. Because I treated the subject exhaustively in that case, I will only restate my conclusions here. (Emphasis added) (p. 78)

Justice Brennan continued:

Recent scholarship indicates that the Framers never intended to constitutionalized the doctrine of state sovereign immunity; consequently the Eleventh Amendment was not an effort to reestablish, after *Chisholm v. Georgia*, 2 Dall. 419 (1793), a limitation on federal judicial power contained in Article III. (p. 78)

Moving to the heart of the matter, the textual content of the Eleventh Amendment, Justice Brennan continued to explain his analysis of the Eleventh Amendment.

Nor, given the limited terms and context in which the Eleventh Amendment was drafted, could the Amendment's narrow and technical language be understood to have instituted a broad new limitation on the federal judicial power in cases "arising under" federal law whenever an individual attempts to sue a State. (p. 78)

Tying the historical record and the language of the Constitution to the text of the Eleventh Amendment, an exercise in which one could only hope the full Court would have engaged had not a narrow majority already fixed on a predetermined end, the preservation of the doctrine of sovereign immunity (which itself had been based on a misinterpretation of language), Justice Brennan explained:

Rather, as the historical records and the language of the Constitution reveal, the Amendment was intended simply to remove federal-court jurisdiction over suits against a State where the basis for jurisdiction was that the



plaintiff was a citizen of another State or an alien – suits which result in the abrogation of the *state* law of sovereign immunity in *state-law* causes of action. (Emphasis in original) (p. 78)

Because the Court ignored the text of the Eleventh Amendment as well as the historical context surrounding the adoption of the Eleventh Amendment, because the Court sought to implement what it *presumed* to be the underlying principle of the Eleventh Amendment, i.e., sovereign immunity, the Court's opinions would lack consistency as well as a basic analytical underpinning. Following the discussion in which he illustrated the Rehnquist majority's inconsistent holdings, Justice Brennan proceeded to examine the Court's rationale:

By way of explication [the explanation for its inconsistent record, particularly its attempts to explain the reasons for interpreting similar legal situations differently in two opinions], the Court retreats to the position that federal courts may grant relief prospectively, that is, against ongoing and future violations of federal law, but not retroactively, that is, against past violations of federal law. (p. 77)

Justice Brennan continued by explaining a balancing test that the Court had constructed:

Basically what the Court is doing, as it admits in this case, is balancing the Eleventh Amendment and the Supremacy Clause. *Ante*, at 68. If relief is sought against continuing violations, the Court finds that the Supremacy Clause outweighs the Eleventh Amendment; but if relief is requested against past violations, the Court determines that the Eleventh Amendment outweighs the Supremacy Clause. (p. 77)

And then, Justice Brennan pointed to the lack of constitutional underpinning for the Court's construction:

The Court cites not constitutional authority for this balancing test and has not offered, *and I suspect cannot offer*, a satisfactory analytical foundation for it. Furthermore, I strenuously disagree with the Court's suggestion that the balance it has struck sufficiently protects the supremacy of federal law. (Emphasis added) (p. 77)

Justice Brennan noted the effect of the Court's narrow-majority opinion:

From this day forward, at least with regard to welfare programs, States may refuse to follow federal law with impunity, secure in the knowledge that all

they need do to immunize themselves from accountability in federal courts is to conform their policies to federal law on the eve of judgment... (p. 77)

Justice Brennan continued by noting the impact on individuals of the state's noncompliance efforts that resulted in the states saving money at the expense of needy & qualifying individuals:

During the period of noncompliance, States save money by not paying benefits according to the criteria established by federal law, while needy individuals designated by Congress as the beneficiaries of welfare programs are cheated of their federal rights. (pp. 77-78)

Justice Brennan concluded by noting the reward for noncompliance by the states for violating federal law that was sanctioned by the Court in *Green v. Mansour* as well as by drawing attention to the incongruity between the Supremacy Clause and the Court's Eleventh Amendment jurisprudence:

Once again, the Court's doctrine "require[s] [sic] the federal courts to protect States that violate federal law from the legal consequences of their conduct." ... Surely the Supremacy Clause requires a different result. The foregoing reveals the fundamental incoherence of the Court's Eleventh Amendment jurisprudence. (p. 78)

*Significance for the eleventh amendment.*

The Court's inconsistency regarding the Eleventh Amendment, particularly as shown by its holdings in *Quern* and *Green v. Mansour*, indicate a struggle to address the constitutional issues, particularly when the Court appears to have a pre-determined end in sight. That pre-determined end, as will be shown, provides one of the consistencies of Eleventh Amendment jurisprudence. The other consistency lies in the conception of what Eleventh Amendment jurisprudence would be were that jurisprudence anchored in the text of both the Eleventh Amendment and its application to the text and case law of the Constitution as articulated by Justice Brennan. Both will appear in ensuing cases.

***Pennsylvania v. Union Gas Company, 491 U.S. 1 (1989).***

*Case summary.*

The facts and procedural history of the case are long and complicated. Events originally began in 1900, some eighty-eight (88) years before the full culmination of those beginnings came to reside in argument before the U.S. Supreme Court. The facts involve two private companies, coal tar wastes produced by an unnamed coal gasification plant (that began operation around 1900), the dismantlement of the coal gasification plant in 1950, the acquisition of the coal gasification plant property by the Union Gas Company (either before or after the dismantling of the plant; the Court record did not indicate when), subsequent easements acquired by the Commonwealth of Pennsylvania, large-scale flood-control actions by the Commonwealth of Pennsylvania in 1980 centered on Brodhead Creek, the unanticipated discovery of coal tar deposits originally placed in close proximity to Brodhead Creek by the original coal gasification company, the ensuing contamination of the creek by the uncovered coal tar deposits, successful cleanup efforts by the State and the Federal Government working together cooperatively, a congressional act entitled the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, or its acronym, CERCLA, congressional amendment of CERCLA during the course of legal proceedings by the Superfund Amendments and Reauthorization Act of 1986 (SARA), and, finally, the federal Environmental Protection Agency.

The epicenter of all of these facts was situated in portions of Brodhead Creek located near Stroudsburg, Pennsylvania. The community of Stroudsburg, Pennsylvania, sits approximately four miles west of the Delaware Water Gap, which is on the west bank of the Delaware River, a waterway that serves as the boundary between western New Jersey and eastern Pennsylvania. Located near the Kittatinny Mountains of New Jersey, the Pocono Mountains of Pennsylvania, and the Delaware State Forest, Stroudsburg is also situated in the

midst of several ski areas as well. In addition, Stroudsburg is located in what has been officially designated as the Chesapeake Bay Watershed Area. The events transpiring on Brodhead Creek resulted in its being designated “the Nation’s first emergency Superfund site” by the Environmental Protection Agency (p. 6).

The first legal action was initiated by the United States. Having reimbursed the Commonwealth of Pennsylvania “for cleanup costs of \$720,000” as provided by the congressional acts, the federal government “sued Union Gas” under the provisions of CERCLA (p. 6). The United States claimed “that Union Gas was liable for such costs because the company and its predecessors had deposited coal tar into the ground near Brodhead Creek” (p.

6). Whereupon Union Gas Company

filed a third-party complaint against Pennsylvania, asserting that the Commonwealth was responsible for at least a portion of the costs because it was an “owner or operator” of the hazardous-waste site, ... and because its flood-control efforts had negligently caused or contributed to the release of the coal tar into the creek. (p. 6)

Regarding the third-party complaint, the Commonwealth of Pennsylvania claimed that “its Eleventh Amendment immunity barred the suit” (p. 6). Agreeing with the Commonwealth’s assertion of immunity, the “District Court dismissed the complaint” (p. 6). Subsequently a “divided panel of the Court of Appeals for the Third Circuit affirmed” the lower federal court’s dismissal of the third-party complaint on Eleventh Amendment grounds in *United States v. Union Gas Co.*, 792 F. 2d 372 (1986) (p. 6).

The legal situation became more complicated upon the Union Gas Company’s appeal to the U.S. Supreme Court. As recounted by Justice Brennan’s majority opinion in which he reviewed the legal events beginning with the appeal by the Union Gas Company and afterwards announced the ruling of the Court in Part I of the opinion:

While Union Gas' petition for certiorari was pending, Congress amended CERCLA by passing SARA. We granted certiorari, vacated the Court of Appeals' opinion, and remanded for reconsideration in light of these amendments... On remand, the Court of Appeals held that the language of CERCLA, as amended, clearly rendered States liable for monetary damages and that Congress had the power to do so when legislating pursuant to the Commerce Clause. *United States v. Union Gas Co.*, 832 F. 2d 1343 (1986). We granted certiorari, 485 U.S. 958 (1988), and now affirm. (p. 6)

The preceding quotation ended Part I of the Court's opinion in *Pennsylvania v. Union Gas Co.* Part II of the opinion focused on confronting the legal question, "whether CERCLA, as amended by SARA, clearly expresses an intent to hold States liable in damages for conduct described in the statute" (p. 7). Buttressing the focus of the legal question, Justice Brennan cited *Hans v. Louisiana* and described the Court's holding in that case before deriving an additional point from a more recent case:

[T]his Court held that the principle of sovereign immunity reflected in the Eleventh Amendment rendered the States immune from suits for monetary damages in federal court even where jurisdiction was premised on the presence of a federal question. Congress may override this immunity when it acts pursuant to the power granted it under § 5 of the Fourteenth Amendment, but it must make its intent to do so "unmistakably clear." See *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). (p. 7)

During the course of the Court's consideration of the legal question addressed in Part II, Justice Brennan directly rebutted seven points of Justice White's arguments expressed in the dissenting opinion he authored which had been joined by Chief Justice Rehnquist and Justices Kennedy and O'Connor. Regarding the legal question addressed by Part II of the opinion, the Commonwealth of Pennsylvania asserted "that CERCLA merely makes clear that States may be liable to the *United States*, not that they may be liable to private entities such as Union Gas" (p. 11). Finding that "Congress intended to permit suits brought by private citizens against the States," the Court announce its holding regarding the first legal question: "We thus hold that the language of

CERCLA as amended by SARA clearly evinces an intent to hold States liable in damages in federal court” (pp. 12, 13).

The answer to the first legal question given above created a second legal question, a constitutional question that provided the focus for Part III of the Court’s opinion: Does “the Commerce Clause grant Congress the power to enact such a statute” as CERCLA, a statute which “clearly permits suits for money damages against States in federal court” (p. 13)? The Commonwealth of Pennsylvania argued “that the principle of sovereign immunity found in the Eleventh Amendment precludes such congressional authority” (pp. 13-14). Justice Brennan announced the Court’s response, “We do not agree” (p. 14). Beginning the Court’s explanation of the reasoning used to reach a position of disagreement with the Commonwealth’s argument regarding Eleventh Amendment immunity for the states from suit, Justice Brennan cited the Court’s ruling in *Parde*, highlighting the importance of that case as the beginning of “a trail unmistakably leading to the conclusion that Congress may permit suits against the States for money damages” (p. 14):

The trail begins with *Parde v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964). There, in responding to a state-owned railway’s argument that Congress had no authority to subject the railway to suit, we concluded that “the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce,” *id.*, at 191, and that “[b]y [sic] empowering congress to regulate commerce, ... the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation,” *id.*, at 192. (p. 14)

After examining more of the Court’s case law that marked the “path” he had indicated previously, Justice Brennan moved to case law of the federal circuit courts of appeal. Citing decisions from the 2nd, 3rd, 5th, 7th, and 9th circuits, Justice Brennan pronounced:

It is no accident, therefore, that every Court of Appeals to have reached this issue [congressional abrogation of “States’ immunity when acting pursuant to the Commerce Clause”] has concluded that Congress has the authority to

abrogate States' immunity from suit when legislating pursuant to the plenary powers granted it by the Constitution. (p. 15)

In continuing to address the legal question regarding the conflicting arguments posed by the Eleventh Amendment and the plenary grant of power to Congress contained in the Commerce Clause, Justice Brennan effectively countered points offered by Justice Scalia in his mixed opinion, doing so by drawing attention to the argumentative tricks and techniques employed by Scalia, as well as the faulty reasoning engaged in by the partly concurring, partly dissenting justice. Justice Brennan concluded his critical analysis of Scalia's reasoning with an announcement of the Court's initial finding regarding the constitutional question:

When one recalls ... *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 495 (1983), Justice Scalia's conception of *Hans*' holding looks particularly exaggerated. Our prior cases thus indicate that Congress has the authority to override States' immunity when legislating pursuant to the Commerce Clause. This conclusion is confirmed by a consideration of the special nature of the power conferred by that Clause. (p. 19)

Considering the "special nature" of the Commerce Clause during examination of the constitutional question posed by the intersection of the Eleventh Amendment and the Commerce Clause, Justice Brennan called attention to the fact that "the Commerce Clause withholds power from the States at the same time as it confers it on Congress" (p. 19). Continuing the Court's consideration of the grant of power to Congress contained in the Commerce Clause, Justice Brennan reasoned:

[B]ecause the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. (pp. 20-21)

Connecting the Commerce Clause to environmental regulation, Justice Brennan noted, “Hence, the Commerce Clause as interpreted in *Philadelphia v. New Jersey* ensures that we often must look to the Federal Government for environmental solutions” (p. 21) because the

general problem of environmental harm is often not susceptible of a local solution. See *Illinois v. Milwaukee*, 406 U.S. 91 (1972) (recognizing authority of federal courts to create federal “common law” of nuisance to apply to interstate water pollution, displacing state nuisance laws). (p. 20).

The final argument posed by the Commonwealth of Pennsylvania asserted “that the federal judicial power as set forth in Article III does not extend to *any* suits for damages brought by private citizens against unconsenting States” (Emphasis in original) (p. 22). Responding to the inverse of the Commonwealth’s argument, the Court observed, “We have never held, however that Article III does not permit such suits where the States have consented to them” (p. 22). The Court responded in a manner which subtly indicated the irrelevancy of Article III to the discussion as framed by the Court, “Pennsylvania’s argument thus is answered by our conclusion that, in approving the commerce power, the States consented to suits against them based on congressionally created causes of action” (p. 22).

Having concluded analysis of the constitutional question in Part III, and having answered the question posed in Part II, the Court announced its final holding and disposition of the case in Part IV. According to the Court:

We hold that CERCLA renders States liable in money damages in federal court, and that Congress has the authority to render them so liable when legislating pursuant to the Commerce Clause. Given our ruling in favor of Union Gas, we need not reach its argument that *Hans v. Louisiana*, 134 U.S. 1 (1890), should be overruled. We affirm the judgment of the Court of Appeals for the Third Circuit and remand the case for further proceedings consistent with this opinion. (p. 23)

Regarding concurring and dissenting opinions, these being in addition to the “official” opinion of the Court’s majority, individual justices discovered in the latter part of the Twentieth



Century what it took the American public longer to realize, a realization that emerged only in the Twenty-first Century with the development of social media, e.g., Facebook. That realization consists of a misapprehension that anyone who offers an opinion, regardless of their expertise or training (or in the Court's case, regardless of two hundred years of tradition, custom, and practice dictating otherwise as instituted by Chief Justice John Marshall), is an "expert" by virtue of being published on a website, although in the case of multiple opinions by the multiple justices, even greater expert status than that accruing to a member of the Court flows from authoring one's own opinion so as to be "officially recognized" by being included in the official volume of the reports of the Supreme Court, the *United States Reports*. The opinions offered in *Pennsylvania v. Union Gas Co.* are multiple and complicated. Some concur, some dissent, while yet others "join as to Parts II, III, and IV, concurring in part and dissenting in part" (p. 29). For the record, as described by the Court's report of the case:

Brennan, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which Marshall, Blackmun, Stevens, and Scalia, JJ., joined, and an opinion with respect to Part III, in which Marshall, Blackmun, and Stevens, JJ., joined. Stevens, J., filed a concurring opinion, *post*, p. 23. Scalia, J., filed an opinion concurring in part and dissenting in part, in Parts II, III, and IV of which Rehnquist, C.J., and O'Connor and Kennedy, JJ., joined, *post*, p. 29. White, J., filed an opinion concurring in the judgment in part and dissenting in part, in Part I of which Rehnquist, C.J., and O'Connor and Kennedy, JJ., joined, *post*, p. 45. O'Connor, J., filed a dissenting opinion, *post*, p. 57. (pp. 3-4)

The proliferation of dissenting and concurring opinions became more noticeable under the leadership exercised by Chief Justice Rehnquist. One legal scholar remarked, "[N]owadays, dissents express disagreements over matters once considered too inconsequential to merit a separate opinion, and, in Justice Lewis Fr. Powell's words, they are not 'a model of temperate discourse'" (Hall, 1992, p. 609).

*Significance for the eleventh amendment.*

The significance of *Pennsylvania v. Union Gas Co.* lies in directly confronting the issue not squarely faced by the Court in its previous decision in *Parden v. Terminal Railroad Company*, the question of congressional authority abrogating state immunity from suit under the Eleventh Amendment when acting pursuant to its plenary authority granted by Article I, § 8 of the Constitution “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The implication of *Pennsylvania v. Union Gas Co.* regarding the other grants of plenary power to Congress contained in Article I, § 8 of the U.S. Constitution at this point is unknown; however, it would be most difficult to defend state immunity from suits filed in federal courts in any of the grant areas, should Congress so choose.

The immediately preceding conjectures flowed from the Court’s holding in *Pennsylvania v. Union Gas Co.*, from a reading of the literal text of the Eleventh Amendment, and from a textual reading of the Constitution’s Article I sections and its Article III sections. However, as will be subsequently shown, the slim Court majority’s ruling in *Seminole Tribe v. Florida* deviated once again from textual considerations. Justice Stevens’ concurring opinion in *Pennsylvania v. Union Gas* explained how the nation came to have two Eleventh Amendments, a point that should be kept in mind in proceeding to examine subsequent Eleventh Amendment jurisprudence. As stated by Justice Stevens:

It is important to emphasize the distinction between our two Eleventh Amendments. There is first the correct and literal interpretation of the plain language of the Eleventh Amendment that is fully explained in Justice Brennan’s dissenting opinion in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985). In addition, there is the defense of sovereign immunity that the Court has added to the text of the Amendment in cases like *Hans v. Louisiana*, 134 U.S. 1 (1890). (p. 23)

After characterizing the second version of the Eleventh Amendment as a “judicially created doctrine of state immunity,” Justice Stevens referred again to Justice Brennan’s dissenting opinion in *Atascadero* (p. 24):

Because Justice Brennan’s opinion in *Atascadero* and the works of numerous scholars<sup>118</sup> have exhaustively and conclusively refuted the contention that the Eleventh Amendment embodies a general grant of sovereign immunity to the States, further explication on this point is unnecessary. (p. 24)

Justice Stevens then directly addressed the proper linkage between the Eleventh Amendment and the Article III clauses referencing judicial power, a linkage based on the plain text of each section of the Constitution:

Suffice it to say that the Eleventh Amendment carefully mirrors the language of the citizen-state and alien-state diversity clauses of Article III and *only* provides that “[t]he Judicial power of the United States shall not be construed to extend” *to these cases*. There is absolutely nothing in the text of the Amendment that in any way affects the other grants of “judicial Power” contained in Article III. Plainer language is seldom, if ever, found in constitutional law. (p. 24)

Besides keeping in mind Justice Stevens’ point regarding the fact of two Eleventh Amendments, one textual and one created by the judiciary, the reader will also need to keep in mind Justice Stevens’ analysis of the Eleventh Amendment-Article III connection when reading subsequent majority reports of which Rehnquist is a member.

***Seminole Tribe v. Florida, 517 U.S. 44 (1996).***

*Facts & procedural history.*

The facts of the case involved a tribal government (the Seminole Tribe of Florida), a state government (Florida) as headed by its governor (Lawton Chiles), a congressional act (the Indian Gaming Regulatory Act), Article I, § 8, cl. 3 of the Constitution (the Commerce Clause), and the Eleventh Amendment to the Constitution. The ultimate purpose of the act was to provide a

vehicle for the regulation of gaming activities in Indian country as conducted by the various Indian tribes (whose sovereign status as “dependent domestic nations” lay somewhere between the state and federal governments, the tribes possessing “a status higher than that of states”) (*Cherokee Nation v. Georgia*, 30 U.S. 1, 17; *Native American Church v. Navajo Tribal Council*, 272 F. 2d. 131) (See Appendix R for a fuller discussion of the status of Indian tribes and their citizens).

Congress enacted the Indian Gaming Regulatory Act pursuant to its authority under the Commerce Clause, more particularly under the portion of the Commerce Clause empowering Congress “To regulate Commerce ... with the Indian Tribes” (U.S. Constitution, § 8, cl. 3). Throughout our nation’s history and jurisprudence, that power has been held to reign supreme, subject only to the limitations on federal power contained in the “Bill of Rights” (Cohen, p. 91). The Marshall Court had originally held that the federal government held sole jurisdiction over Indian Affairs<sup>119</sup> when the Court declared in *Worcester v. Georgia* that “[t]he whole intercourse between the United States and this nation [the Cherokee Nation], is, by our Constitution and laws, vested in the government of the United States” (31 U.S. 515, 561). More specifically, the federal power over Indian Affairs rested primarily in the hands of Congress. According to Chief Justice Marshall, speaking for the Court in *Worcester v. Georgia* (1832):

That instrument [the Constitution of the United States] confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions; the shackles imposed on this power, in the confederation, are discarded. (31 U.S. 515, 559)

Felix Cohen, the great authority on federal Indian law, in discussing the “frequent” references “to the so-called ‘plenary’ power of Congress over the Indians,” made the following observations and concluded as follows:

[I]t is clear that the powers mentioned by Chief Justice Marshall proved to be so extensive that in fact the Federal Government’s powers over Indian affairs are as wide as state powers over non-Indians, and therefore one is practically justified in characterizing such federal power as “plenary.” This does not mean, however, that congressional power over Indians is not subject to express limitations upon congressional power, such as the Bill of Rights. (Cohen, p. 90)

With regard to gaming on tribal land, Congress carved out an exception to the country’s national history of policy regarding Indian Affairs and granted the state governments authority to work with the Indian tribes located within their borders in order to establish and regulate tribally-owned gaming activities on tribal land. According to the Court’s description, the Indian Gaming Regulatory Act allowed

an Indian tribe to conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. 25 U.S.C. § 2710(d)(1)(C). Under the Act, States have a duty to negotiate in good faith with a tribe toward the formation of a compact, § 2710(d)(3)(A), and a tribe may sue a State in federal court in order to compel performance of that duty, § 2710(d)(7). (p. 44)

Upon Florida’s refusal “to enter into any negotiation for inclusion of [certain gaming activities] [sic] in a tribal-state compact” in violation of the “requirement of good faith negotiation” contained in the Indian Gaming Regulatory Act, the Seminole Tribe of Florida filed suit in the Federal District Court for the Southern District of Florida as specified by the Act (p. 52). Governor Chiles and the State of Florida responded by “arguing that the suit violated the State’s sovereign immunity from suit in federal court” and asked the court to dismiss the suit on those grounds. Having their motion to dismiss the suit on Eleventh Amendment grounds, Governor Chiles and the State of Florida “took an interlocutory appeal of that decision” since the

“collateral order doctrine allows immediate appellate review of order denying claim of Eleventh Amendment immunity” (p. 52). Upon reviewing the decision of the Federal District Court for the Southern District of Florida, the Court of Appeals for the Eleventh Circuit reversed the lower court’s ruling, “holding that the Eleventh Amendment barred petitioner’s suit against respondents [the State of Florida]” (p. 52). The Supreme Court, having granted certiorari to the Seminole Tribe of Florida to review the Eleventh Circuit Court’s ruling, provided details of that court’s ruling:

The court [the Eleventh Circuit Court] agreed with the District Court that Congress ... intended to abrogate the States’ sovereign immunity, and also agreed that the Act had been passed pursuant to Congress’ power under the Indian Commerce Clause... The court disagreed with the District Court, however, that the Indian Commerce Clause grants Congress the power to abrogate a State’s Eleventh Amendment immunity from suit, and concluded therefore that it had no jurisdiction over petitioner’s suit against Florida. (pp. 52-53)

Continuing to describe the Eleventh Circuit Court’s ruling, the Supreme Court provided further details about that court’s additional holding.

The court further held that *Ex parte Young*, 209 U.S. 123 (1908), does not permit an Indian tribe to force good-faith negotiations by suing the Governor of a State. Finding that it lacked subject-matter jurisdiction, the Eleventh Circuit remanded to the District Court with directions to dismiss petitioner’s suit. (p. 53)

In the meantime, two additional events occurred prior to the Supreme Court’s review of the Eleventh Circuit Court’s ruling. First, following the Southern Florida District Court’s denial of its motion to dismiss and in close proximity to its appeal to the Eleventh Circuit Court, the State of Florida filed a “summary judgment motion” with the U.S. District Court for the Southern District of Florida claiming “that Florida had fulfilled its obligation under the Act to negotiate in good faith” (p. 53, n. 6). Upon investigation and analysis, the Southern Florida District Court approved the State of Florida’s motion; whereupon the Seminole Tribe filed an

appeal with the Eleventh Circuit Court who “stayed its review of that decision pending the disposition of this case [the original suit filed in federal district court by the Seminole Tribe of Florida]” (p. 53, n. 6).

Second, the following event occurred at the Eleventh Circuit Court. As described by the U.S. Supreme Court:

Following its conclusion that petitioner’s suit should be dismissed, the Court of Appeals went on to consider how § 2710(d)(7) would operate in the wake of its decision. The court decided that those provisions of § 2710(d)(7) that were problematic could be severed from the rest of the section, and read the surviving provisions of § 2710(d)(7) to provide an Indian tribe with immediate recourse to the Secretary of the Interior from the dismissal of a suit against a State. (p. 53, n. 4)

*Legal questions.*

The first legal question, as posed by the Court: “Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause” (p. 53)? This question gave rise to two subsidiary questions: “first, whether Congress has ‘unequivocally expresse[d] [sic] its intent to abrogate the immunity,’ *Green v. Mansour* ... ; and second, whether Congress has acted ‘pursuant to a valid exercise of power,’ *ibid*” (p. 55). The second legal question, again as posed by the Court: “Does the doctrine of *Ex parte Young* permit suits against a State’s Governor for prospective injunctive relief to enforce the good-faith bargaining requirement of the Act” (p. 53)?

*Legal reasoning of opposing parties.*

Regarding the authority posed by the Indian Commerce Clause, attorneys for the Seminole Tribe argued that “[t]here [sic] is no principled basis for finding that congressional power under the Indian Commerce Clause is less than that conferred by the Interstate Commerce

Clause” (p. 60). Attorneys for the Seminole Tribe reminded the Court that “the *Union Gas* plurality found the power to abrogate from the ‘plenary’ character of the grant of authority over interstate commerce,” and since there is no textual differentiation, in terms of the power granted, between congressional power to regulate commerce “among the States” and to regulate commerce “with the Indian tribes,” the power of Congress regarding the Indian tribes, particularly to eliminate state immunity from suit, is as complete as that noted by the Court in its *Union Gas* decision (p. 60; U.S. Constitution, Article I, § 8, cl. 3). The Seminole Tribe’s attorneys further contended that

the Indian Commerce Clause vests the Federal Government with “the duty of protect[ing]” [sic] the tribes from “local ill feeling” and “the people of the States,” *United States v. Kagama*, 118 U.S. 375, 383-384 (1886), ... [and] that the abrogation power [the power to remove state immunity from lawsuit] is necessary “to protect the tribes from state action denying federally guaranteed rights.” (p. 60)

Attorneys for the State of Florida argued that the Indian Commerce Clause was dissimilar to the Interstate Commerce Clause. According to the Court’s description of that argument:

They [attorneys for the State of Florida] note that we have recognized that “the Interstate Commerce and Indian Commerce Clauses have very different applications,” *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), and from that they argue that the two provisions are “wholly dissimilar.” Brief for Respondents 21. (pp. 60-61)

The Court continued its explanation of the State of Florida’s arguments that the Indian Commerce Clause differed from the Interstate Commerce Clause:

Respondents [the State of Florida’s attorneys] contend that the Interstate Commerce Clause grants the power of abrogation only because Congress’ authority to regulate interstate commerce would be “incomplete” without that “necessary” power. *Id.*, at 23, citing *Union Gas*, *supra*, at 19-20. The Indian Commerce Clause is distinguishable, respondents contend, because it gives Congress complete authority over the Indian tribes. Therefore, the abrogation power is not “necessary” to Congress’ exercise of its power under the Indian Commerce Clause. (p. 61)



Interestingly, the State of Florida's attorneys presented an argument against the Indian Gaming Regulatory Act based on Tenth Amendment Grounds, an argument that was noted by the Court as follows:

Respondents also contend that the Act mandates state regulation of Indian gaming and therefore violates the Tenth Amendment by allowing federal officials to avoid political accountability for those actions for which they are in fact responsible. See *New York v. United States*, 505 U.S. 144 (1992). This argument was not considered below by either the Eleventh Circuit or the District Court, and is not fairly within the question presented. Therefore we do not consider it here. See this Court's Rule 14.1; *Yee v. Escondido*, 503 U.S. 519 (1992). (p. 61, n. 10)

Regarding arguments centering on the application of *Ex parte Young*, the Court mentioned one argument presented by the Seminole Tribe (p. 73), but did not discuss any of the arguments presented by the State of Florida. Because of the unsound and illogical legal reasoning employed by the Court in presenting its opinion, this writer is reluctant to attempt any efforts aimed at deducing from the Court's opinion such arguments that might have been presented by the State of Florida.

*Holding & disposition.*

The Court affirmed the Circuit Court's opinion and held "that the Indian Commerce Clause did not grant Congress the power to abrogate the States' eleventh Amendment immunity" (p. 44). The Court also affirmed the Circuit Court's ruling "that *Ex parte Young*, 209 U.S. 123, does not permit an Indian tribe to force good-faith negotiations by suing a State's Governor" (p. 44).

*Court's rationale.*

Previously in this paper, mention was made of a fault line regarding issues of sovereignty that was situated first, in American politics, and subsequently, in American jurisprudence. Made

in reference to the historical background and the case law regarding the Tenth Amendment to the Constitution, some of those remarks follow:

Clashes involving the Tenth Amendment reveal a primordial fault line in American politics with local and state rights located on one side and national government supremacy situated on the other.... Finally, political clashes along America's fault line presaged the legal clashes contained in the case law of the Tenth Amendment.... These political clashes provide the historical context required to more fully understand the ensuing legal battles over government sovereignty in the United States. (Janson, 2011, pp. 268-269)

At the time the remarks were written, little did this writer suspect that the “primordial fault line in American politics” would reveal itself in Eleventh Amendment jurisprudence; yet that is precisely what *Seminole Tribe of Florida v. Florida* clarified for this writer, that the same fault line identified in Tenth Amendment issues also served as a fractal subterranean demarcation line of Eleventh Amendment disputes.

One can trace its judicial development, beginning first with the Court's decision in *Hans v. Louisiana*, the initial identifying thread of argument being a focus, or lack thereof, on textual support of the Constitution for one's legal position. The *Hans* Court referenced what it thought was the mistake of the Court in the *Chisholm* decision, that of being “swayed by a close observance of the letter of the Constitution” (134 U.S. 1, 12). The *Hans* Court was not to be bound by seeking a textual reason for incorporating the common law doctrine of sovereign immunity into the nation's jurisprudence. In the Court's view:

It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals.... It is enough for us to declare its existence. (134 U.S. 1, 21)

The textually-based thread of argument next appeared in Justice Brennan's dissenting opinions in *Atascadero State Hospital v. Scanlon* (a case not briefed, but whose remarks were cited in

subsequent Court opinions) and in *Green v. Mansour* as well as his plurality opinion in *Pennsylvania v. Union Gas Co.* The Eleventh Amendment's textual thread revealing the fault line in American political life and jurisprudence picked up a complementary thread of argument, the existence of two Eleventh Amendments, in Justice Stevens concurring opinion in *Pennsylvania v. Union Gas Co.* That complimentary thread was based, in part, on Justice Brennan's *Atascadero* and *Green v. Mansour* dissenting opinions, dissents which had added yet more supporting argumentative threads of complementary color to the original textual argument.

Before discussing any additional argumentative threads revealing the fault line, we should remember the two initial threads already identified: first, the argumentative thread centering on textual support for the Court's constitutional interpretations of the Eleventh Amendment; second, the existence of two separate Eleventh Amendments in American jurisprudence. The additional complimentary threads revealed by the Court's justices consisted of the following individual strands:

- the Court's decision in *Hans* involved an incorporation of the common law doctrine, sovereign immunity;
- the Court's misunderstanding of the historical common law experience in America, originally being the "body of judge-made law that was administered in the royal courts of England" with the corresponding amended understanding by Americans that any common law adopted in America was amenable to legislative amendment (Hall, 1992, p. 170);
- the Court's decision in *Hans*, along with subsequent interpretations resting on *Hans*, misrepresented the actual historical experiences with both common law and with the Eleventh Amendment, which, in turn, did not provide for a full understanding of the

- actual implications of *Hans* as a decision grounded in common law and thus amenable to legislative revision; and finally,
- the recognition that the original intent by the framers of the Constitution and the Eleventh Amendment (as determined by expert research on the part of multiple professional historians and legal scholars as published in peer-reviewed journals of impeccable quality) did not support the Court's original decision in *Hans*, thus rendering that opinion groundless as a precedent for current or future Court rulings in terms of textual, legal, analytical, and historical support.

In the current case, *Seminole Tribe of Florida v. Florida*, all of the preceding argumentative threads were picked up and woven by Justice Stevens' and by Justice Souter's two dissenting opinions into a model of constitutional interpretation that was textually-based and which grounded itself in the historical record and upon original intent as expressed in both debate and written communications. Furthermore, Justice Souter's dissent, while basing itself on Brennan's and Stevens' previous opinions, extended and updated their arguments. Finally, Justice Souter's dissenting opinion incorporated a final complementary strand into the discussion, a recognition based on the understanding of America's unique contribution to sovereignty, a contribution hitherto unrecognized in the Court's Eleventh Amendment's jurisprudence. According to Justice Souter, the ratification of the Constitution "affected ... sovereignty in a way different from any previous political event in America or anywhere else" (p. 150). As articulated by Justice Souter:

For the adoption of the Constitution made them members of a novel federal system that sought to balance the States' exercise of some sovereign prerogatives delegated from their own people with the principle of a limited but centralizing federal supremacy. (p. 150)

Justice Souter continued:

As a matter of political theory, this federal arrangement of dual delegated sovereign powers truly was a more revolutionary turn than the late war [the American Revolution] had been. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty”).

Justice Souter next pointed to the underpinning foundation of this remarkable achievement:

The American development of divided sovereign powers, which “shatter[ed] ... [sic] the categories of government that had dominated Western thinking for centuries,” *id.*, at 385, was made possible only by a recognition that the ultimate sovereignty rests in the people themselves.... [T]he Federalists could succeed only by emphasizing that the supreme power “‘*resides* in the PEOPLE, as the fountain of government’”... The People possessing this plenary bundle of specific powers were free to parcel them out to different governments and different branches of the same government as they saw fit. (Emphasis in the original) (pp. 151-152)

Tying that development into the Rehnquist Court’s Eleventh Amendment holding, Justice Souter pointed out the inconsistency of the two developments:

[T]he Court’s position runs afoul of the general theory of sovereignty that gave shape to the Framers’ enterprise. An enquiry [sic] into the development of that concept demonstrates that American political thought had so revolutionized the concept of sovereignty itself that calling for the immunity of a State as against the jurisdiction of the national courts would have been sheer illogic. (pp. 149-150)

Continuing, Justice Souter noted:

Given this metamorphosis of the idea of sovereignty in the years leading up to 1789, the question whether the old immunity doctrine might have been received as something suitable for the new world of federal-question jurisdiction is a crucial one. See, e.g., Amar, *supra*, at 1436 (“By thus relocating true sovereignty in the People themselves ... Americans domesticated government power and decisively repudiated British notions of ‘sovereign’ governmental omnipotence” (footnote omitted)). (p. 153 & p. 153, n. 48)

In other words, the novel American concept of sovereignty as resting in the people made absurd any claims of sovereign immunity, particularly outside the limited text of the Eleventh Amendment.

So there it is, the primordial fault line in American political and judicial life, originally thought by this writer to reveal itself primarily in Tenth Amendment issues – a fault line that has now demonstrated its full presence in Eleventh Amendment jurisprudence. Logically, this makes sense and could have been intuited previously by a more thoughtful individual, particularly given that both the Tenth and Eleventh Amendments have seen a primary focus on federal-state questions. On the one side of the fault line in Eleventh Amendment jurisprudence stands a textual analysis rooted in historical development and original understanding of the Framers while on the other side stands a common law doctrine of sovereign immunity that is both inapplicable to America's unique political and judicial contributions to political philosophy and to any concept of constitutional inviolability, not to being misunderstood by both the *Hans* and Rehnquist Courts in terms of its common law grounding.

As a result of the discovery regarding this jurisdictional fault line in Eleventh Amendment jurisprudence, subsequent cases in this chapter will be discussed in terms of the Eleventh Amendment fault line. It is this writer's opinion that ultimately the constitutional interpretation of the Eleventh Amendment and its application to American life will come to rest on a more solid foundation, a judicial framework consisting of textual and historical support. Such a foundation would also include an understanding of original intent as revealed in thought and speech, not to mention the application of an understanding of America's unique conception of sovereignty as residing ultimately in the people, not in any state or national government. Currently, a solid constitutional interpretation resides only in the afore-mentioned opinions authored by Justices Brennan, Stevens, and Souter. Currently, what holds judicial sway is an interpretation grounded in common law without any tacit understanding of common law's limitations in the American experience. As a result, focus will center on the two dissenting

opinions as they directly address the Court's faulty reasoning in *Seminole Tribe of Florida v. Florida*.

First of all, this case constituted a lengthy portion of volume 517 of the *U.S. Reports* – one hundred and forty-two (142) pages, to be more precise. Of the three opinions, Rehnquist's occupied approximately thirty (30) pages while Justice Stevens' opinion needed twenty-three (23) pages. Justice Souter's opinion, however, required eighty-six (86) pages. Together, the two dissenting opinions covered one hundred and nine (109) pages. In this writer's opinion, such length was required because the two dissenting opinions did what the majority opinion should have done, but didn't – conduct a legal inquiry based upon constitutional text

- which examined the historical record and the original intent of the Framers of the nation's basic document and of the Eleventh Amendment,
- which recognized the commonality of *Chisholm v. Georgia*, of *Hans v. Louisiana*, of *Fitzpatrick v. Bitzer*, and of *Pennsylvania v. Union Gas Co.*, all of which assumed that Congress had the power “to create a private federal cause of action against a State, or its Governor, for the violation of a federal right” (p. 76),
- which understood the rationale responsible for the narrow wording of the Eleventh Amendment,
- which understood the *Hans* decision in terms of its being grounded in an American incorporation of an English common law doctrine and therefore amenable to congressional amendment, and, finally,
- which incorporated a full understanding of America's unique contribution to political philosophy and science in “split[ting] the atom of sovereignty” by splitting power between two levels of government and by locating the true source of sovereignty in a

recognition that sovereignty resides in the people, an acknowledgement that is fully incompatible with any doctrine of sovereign immunity for the various parts of government to which the people delegated portions of their power (514 U.S. 779, 838).

In explaining the reason for offering his dissenting opinion, Justice Stevens described Justice Souter's dissent and characterized the Court's flawed reasoning as follows:

As Justice Souter has convincingly demonstrated, *the Court's contrary conclusion is profoundly misguided*. Despite the thoroughness of his [Justice Souter's] analysis, supported by sound reason, history, precedent, and strikingly uniform scholarly commentary, *the shocking character of the majority's affront to a coequal branch of our Government* merits additional comment. (Emphasis added) (p. 78)

Justice Stevens pointed out the true meaning of the narrow Court majority's opinion by which *Pennsylvania v. Union Gas Co.* was overruled. According to Justice Stevens:

The majority's opinion does not simply preclude Congress from establishing the rather curious statutory scheme under which Indian tribes may seek the aid of a federal court to secure a State's good-faith negotiations over gaming regulations. Rather, it prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast economy. (p. 77)

In his dissenting opinion, Justice Stevens convincingly demonstrated the fallacious reasoning that lay behind the five-member-majority's holding that the "Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction" (p. 45). The Rehnquist Court relied heavily upon Justice Iredell's dissent in *Chisholm v. Georgia* and upon the Court's opinion in *Hans v. Louisiana*. The Rehnquist five-member majority misinterpreted those decisions as relying upon an assertion put forth by the two states "that Article III did not extend the judicial power to suits against unconsenting States" (p. 78). As Justice Stevens correctly pointed out, "[B]oth of those



opinions [Justice Iredell's dissent in *Chisholm* and the Court's opinion in *Hans*] relied on an interpretation of an Act of Congress rather than [upon] a want of congressional power to authorized a suit against the State" (p. 78). As Justice Stevens pointed out to the five-member-majority headed by Rehnquist:

In concluding that the federal courts could not entertain *Chisholm*'s action against the State of Georgia, Justice Iredell relied on the text of the Judiciary Act of 1789, not the State's assertion that Article III did not extend the judicial power to suits against unconsenting States. Justice Iredell argued that, under Article III, federal courts possessed only such jurisdiction as Congress had provided, and that the Judiciary Act expressly limited federal-court jurisdiction to that which could be exercised in accordance with "the principles and usages of law." *Chisholm v. Georgia*, 2 Dall., at 434 (quoting § 14 of the Judiciary Act of 1789). (pp. 78-79)

Justice Stevens further explained Iredell's dissent as resting on an interpretation of a congressional act, the Judiciary Act of 1789, not upon any Article III argument put forth by a state. Resting entirely upon the text of Justice Iredell's dissent, Justice Stevens pointed out:

He [Justice Iredell] reasoned that the inclusion of this phrase ["the principles and usages of law" referred to immediately preceding as contained in the Judiciary Act of 1789] constituted a command to the federal courts to construe their jurisdiction in light of the prevailing common law, a background legal regime that he believed incorporated the doctrine of sovereign immunity. *Chisholm v. Georgia*, 2 Dall., at 434-436 (dissenting opinion). (p. 79)

Combining a reading of the plain, explicit text of Article III of the U.S. Constitution with the plain, explicit text of Justice Iredell's dissenting opinion, Justice Stevens concluded:

The language of Article III certainly gives no indication that such an implicit bar [protecting the sovereign immunity of states]. That provision's text specifically provides for federal-court jurisdiction over *all* cases arising under federal law. Moreover, as I have explained, Justice Iredell's dissent argued that it was the Judiciary Act of 1789, nor Article III, that prevented the federal courts from entertaining *Chisholm*'s diversity action against Georgia.... In sum, little more than speculation justifies the [Rehnquist Court's] conclusion that the Eleventh Amendment's express but partial limitation on the scope of Article III reveals that an implicit but more general one is already in place. (p. 83)

Next Justice Stevens addressed the Court's ruling in *Hans v. Louisiana*. First, Justice Stevens noted the reliance of Justice Bradley, the author of the Court's *Hans* decision, upon Justice Iredell's dissenting opinion in *Chisholm v. Georgia* and connected both opinions to their consideration to the common law doctrine regarding sovereign immunity.

Justice Bradley's somewhat cryptic opinion for the Court in *Hans* relied expressly on the reasoning of Justice Iredell's dissent in *Chisholm*, which, of course, was premised on the view that the doctrine of state sovereign immunity was a common-law rule that Congress had directed federal courts to respect [in the Judiciary Act of 1789], *not a constitutional immunity that Congress was powerless to displace*. (Emphasis added) (p. 84)

Next, Justice Stevens noted particularly the reliance of Justice Bradley upon examining congressional legislation, in this case the Judiciary Act of 1875, and for that examination to form the basis of the Court's holding in *Hans*, an opinion similar to Justice Iredell's dissent in *Chisholm*. Justice Stevens continued:

For that reason [congressional direction in the Judiciary Act of 1789 for the federal courts to respect the common law doctrine of sovereign immunity, as interpreted in *Chisholm*], Justice Bradley explained that the State's immunity from suit by one of its own citizens was based not on a constitutional rule but rather on the fact that Congress had not, by legislation, attempted to overcome the common-law presumption of sovereign immunity. *His analysis so clearly supports the position rejected by the majority today that it is worth quoting at length*. (Emphasis added) (pp. 84-85)

Justice Stevens then quoted Justice Bradley's opinion focused upon his examination of the Judiciary Act of 1875 to determine congressional intent regarding the common law doctrine of sovereign immunity. Justice Bradley found that Congress "did not intend to invest its courts with any new and strange jurisdictions" [such as federal jurisdiction to hear citizen suits against a state government] (p. 85, citing *Hans v. Louisiana*, 134 U.S., at 18-19). And so, as Justice Stevens pointed out, the Rehnquist Court concocted a constitutional rule that had no textual basis

and enjoyed no precedential support because it relied upon a misinterpretation, intentional or otherwise, of two former Supreme Court cases. As Justice Souter also noted with regards to the Court's distortion of the relationship between Article III and the Eleventh Amendment, it was no mistake that the language of the Eleventh Amendment mirrored the language of Article III.

According to Justice Souter:

In precisely tracking the language in Article III providing for citizen-state diversity jurisdiction, the text of the Amendment does, after all, suggest to common sense that only the Diversity Clauses are being addressed. If the Framers had meant the Amendment to bar federal-question suits as well, they could not only have made their intentions clearer very easily... (p. 111)

Thus, to interpret Article III as containing an implicit bar to Congress regarding its ability to address a mistaken common law application of the doctrine of sovereign immunity via the Eleventh Amendment distorts both Article III and the Eleventh Amendment.

Justice Souter began his dissent by acknowledging the validity of Justice Stevens' view, expressed in his concurring opinion in *Pennsylvania v. Union Gas Co.*, that two Eleventh Amendments existed in American jurisprudence. He used that view to introduce his own critique of the majority opinion's view regarding Article III and the Eleventh Amendment as a prohibition on congressional power to abrogate a state's immunity from suit. According to Justice Souter:

There [Justice White's concurring opinion in *Union Gas*] he explained how it has come about that we have two Eleventh Amendments, the one ratified in 1795, the other (so-called) invented by the Court nearly a century later in *Hans v. Louisiana*, 134 U.S. 1 (1890). Justice Stevens saw in that second Eleventh Amendment no bar to the exercise of congressional authority under the Commerce Clause in providing for suits on a federal question by individuals against a State, and I can only say that after my own canvass of the matter I believe he was entirely correct in that view, for reasons given below. (Emphasis added) (p. 100)

Agreeing that the *Hans* decision incorporated the common law doctrine of sovereign immunity, Justice Souter pointed to its reasoning as being contrary to the Founders' views regarding common law and federalism. According to Justice Souter;

The error of *Hans* reasoning is underscored by its clear inconsistency with the Founders' hostility to the implicit reception of common-law doctrine as federal law, and with the Founders' conception of sovereign power as divided between the States and the National Government for the sake of very practical objectives. The Court's answer today ... is likewise at odds with the Founders' view that common law, when it was received into the new American legal system, was always subject to legislative amendment. (Emphasis added) (p. 102)

Regarding the view of the Framers of the Eleventh Amendment, Justice Souter pointed to the rejection of Representative Sedgwick's proposal following the *Chisholm* decision, a rejection that conclusively indicated that the Eleventh Amendment was not adopted to provide a broad interpretation of sovereign immunity. If Sedgwick's proposal had been adopted, the Eleventh Amendment would have had the text to support the *Hans* decision. However, the amendment proposed by Sedgwick was rejected, and so there is no textual support for the *Hans* decision, a fact first pointed out by Justice Brennan in his dissenting opinion in *Atascadero State hospital v. Scanlon*. Sedgwick's proposed amendment, as he had been directed to offer by the "Legislature of [the] Commonwealth [of Massachusetts]," reads as follows from Justice Souter's quotation of that proposal:

"[N]o state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States." Gazette of the United States 303 (Feb. 20, 1793). (p. 111)

As Justice Souter pointed out:

Congress took no action on Sedgwick's proposal, however, and the Amendment as ultimately adopted two years later could hardly have been

meant to limit federal-question jurisdiction, or it would never have left the States open to federal-question suits by their own citizens. (p. 112)

The Marshall Court was in much closer proximity to the events surrounding both the formation and adoption of the Constitution as well as the Eleventh Amendment. In fact, most members of that Court had either witnessed or participated in those developments. The views of the Marshall Court regarding the Eleventh Amendment were an accurate interpretation of the Eleventh Amendment, a fact that has been an embarrassment to subsequent Courts whose Justices chose to ignore them, e.g., Justices Bradley and Rehnquist. Two cases particularly illustrate the views of the Marshall Court regarding both the purpose and original intent envisioned by the framers of the Eleventh Amendment, *Cohens v. Virginia* (1821) and *Osborn v. Bank of United States* (1824). Both cases were examined by Justice Souter in his examination of the historical record as part of a search for the original intent of the Eleventh Amendment's adoption.

As Justice Marshall pointed out in the unanimous decision of *Cohens v. Virginia*, 19 U.S. 264 (1821) (referenced by Justice Souter in his dissenting opinion as 6 Wheat. 264), the purpose of the Eleventh Amendment, according to the framers of that amendment,

was to bar jurisdiction in suits at common law by Revolutionary War debt creditors, not “to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation.” *Id.*, at 407. (pp. 112-113)

Justice Souter emphasized the following remarks by Chief Justice Marshall in *Cohens*:

Chief Justice Marshall, writing for the Court, emphasized that the Amendment had no effect on federal courts' jurisdiction grounded on the “arising under” provision of Article III and concluded that “a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case.” *Id.*, at 383. (p. 112)

A quick examination of *Cohens v. Virginia* reveals the verbal shenanigans utilized by Justices Bradley and Rehnquist in their efforts to avoid the conflict between the Marshall Court's characterization of the Eleventh Amendment and their own views, and to also avoid utilizing a basic rule of constitutional interpretation requiring an examination of or search for the original intent of those who framed the constitutional provision in question. The subject matter of *Cohens v. Virginia* was a conflict between state and federal law in which Virginia posed an Eleventh Amendment defense that was overridden by the Marshall Court's view "that the Constitution made the Union supreme and that the federal judiciary was the ultimate constitutional arbiter" (Hall, 1992, p. 162). More specifically, the Cohens (Philip and Mendes) had been convicted of violating a Virginia statute forbidding the sale of lottery tickets. The Cohens argued they had sold the lottery tickets in Virginia "under the authority of an act of Congress for the District of Columbia" (Hall, 1992, p. 162). Upon appeal by the Cohens to the U.S. Supreme Court of their conviction, Virginia "asserted that the Eleventh Amendment precluded the Supreme Court from hearing the case and that section 25 of the Judiciary Act of 1789<sup>120</sup> did not apply" (Hall, 1992, p. 162). In delivering the Court's opinion, Chief Justice Marshall directly confronted the constitutional issues arising under the Eleventh Amendment, and at the same time announced the Court's decision in the case on narrower grounds which avoided the issue of Virginia's noncompliance with a constitutional ruling. According to a legal scholar's description of *Cohens*:

He [Chief Justice Marshall] asserted that the Constitution made the Union supreme and that the federal judiciary was the ultimate constitutional arbiter. While the states could interpret their own laws, any federal question must ultimately be resolved, as section 25 provided, only by the federal courts. The Eleventh Amendment did not prevent federal courts from deciding properly a legitimate federal question, even where a state was the appellee. (Emphasis added) (Hall, 1992, p. 163)

The outcome of *Cohens v. Virginia*, as described: “Marshall avoided Virginia noncompliance by holding that the lottery statute applied only in the District of Columbia,” a holding that decided the case on narrower grounds than a ruling on the basis of the constitutional question presented (Hall, 1992, p. 163). However, in order to get to the more narrowly-focused decision, the constitutional question had to be addressed, and it was. So, while technically the holding wasn’t based on the collision between the Eleventh Amendment and congressional legislation pursuant to a constitutional grant of power, i.e., the Judiciary Act of 1789, the entire case was predicated on that conflict. To opine, as Justice Bradley did in *Hans*, that the remarks made by Chief Justice Marshall in *Cohens* were “unnecessary to the decision, and in that sense *extra judicial*” ignored the subject matter of *Cohens* in intellectually dishonest fashion (134 U.S. 1, 20). The remarks also permitted Justice Bradley and the Court to avoid their responsibility to investigate the original intent behind the Eleventh Amendment, an intent expressly addressed in *Cohens*, and an intent that would have led to a far different conclusion than that reached by the Court in *Hans*.

As Justice Souter noted, the Marshall Court’s “treatment of the [Eleventh] Amendment in *Osborn v. Bank of United States*, 9 Wheat. 738 (1824), was to the same effect [as the Marshall Court’s treatment of that amendment in *Cohens v. Virginia*]” (p. 113). Quoting Justice Marshall, Justice Souter interpreted the Marshall Court’s ruling in *Osborn v. Bank of United States*:

The Amendment there was held there to be no bar to an action against the State seeking the return of an unconstitutional tax. “The eleventh amendment of the constitution has exempted a State from the suits of citizens of other States, or aliens,” Marshall stated, omitting any reference to cases that arise under the Constitution or federal law. *Id.*, at 847. (p. 113)

The discerning reader will also note that the Marshall Court based its interpretation of the Eleventh Amendment solely upon the text of that amendment, knowing full well the historical reasons for that amendment as well as the original intent of those who framed the Eleventh

Amendment. Referencing Justice Brennan's dissent in *Atascadero*, Justice Souter noted the importance of the Marshall Court's rulings as a key to understanding the proper judicial approach to be taken regarding the Eleventh Amendment. As Justice Souter pointed out:

The best explanation for our practice belongs to Chief Justice Marshall: the Eleventh Amendment bars only those suits in which the sole basis for federal jurisdiction is diversity of citizenship [meaning, a citizen of another state or of another country, not a citizen of the state being sued, in accordance with the plain language of the amendment]. See *Atascadero State Hospital v. Scanlon*, 473 U.S., at 294 (Brennan, J., dissenting)... (p. 114)

Justice Souter concluded his review of the Marshall Court's interpretation of the Eleventh Amendment and the importance of that interpretation for current jurisprudence in its alignment with the other critical factors to be accounted for in constitutional interpretation:

In sum, reading the Eleventh Amendment solely as a limit on citizen-state diversity jurisdiction [as stated in the plain text of that amendment] has the virtue of coherence with this Court's practice, with the views of John Marshall, with the history of the Amendment's drafting, and with its allusive language. (p. 114)

The Rehnquist five-member majority showed defensiveness concerning the dissenting opinions' references to not only the Rehnquist opinion's lack of textual basis, but the lack of a textual basis in the *Hans* decision upon which Rehnquist was relying. As Justice Rehnquist phrased the response:

The dissent's lengthy analysis of the text of the Eleventh Amendment is directed at a straw man – we long have recognized that blind reliance upon the text of the Eleventh Amendment is “to strain the Constitution and the law to a construction never imagined or dreamed of.” *Monaco, supra*, at 326, quoting *Hans, supra*, at 15. (p. 69)

The textual requirement for conducting a constitutional analysis hardly constitutes a straw dog, as Justice Souter pointed out. In the quote above, Rehnquist relies upon a former case's citation of a previously improperly decided case as justification for his position, a highly dubious



procedure, especially for one so highly placed in our national judiciary. In other words, an erroneous iteration is subsequently reiterated and reiterated, in the mistaken hope that repetitions alone will justify the original mistake and direct attention from its mistaken premises. One can only wonder at Rehnquist's feelings upon having his own words from previous opinions thrown back at him as proof against his own argument in *Seminole Tribe*. According to Justice Souter:

The majority chides me that the “lengthy analysis of the text of the Eleventh Amendment is directed at a straw man,” *ante*, at 69. But plain text is the Man of Steel in a confrontation with “background principle[s]” and “postulates which limit and control,” *ante*, at 68, 72. (p. 116, n. 13)

Justice Souter then summarized a portion drawn from a law review article, the law review article (embarrassingly for Rehnquist) containing utterances from Rehnquist, both as a Justice and as a Chief Justice, which directly refuted his position in *Seminole Tribe*:

An argument rooted in the text of a constitutional provision may not be guaranteed of carrying the day, but insubstantiality is not its failing. See, e.g., Monaghan, Our Perfect Constitution, 56 N.Y.U.L. Rev. 353, 383-384 (1981) (“For the purposes of *legal* reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration”); cf. *Bourjaily v. United States*, 483 U.S. 171, 178 (1987) (Rehnquist, C.J.) (“It would be extraordinary to require legislative history to *confirm* the plain meaning of [Federal Rule of Evidence] 104”); *Garcia v. United States*, 469 U.S. 70, 75 (1984) (Rehnquist, J.) ([O]nly the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the ‘plain meaning’ of the statutory language”). (Emphasis in original) (p. 116, n. 13)

Justice Souter neared the conclusion of his refutation of Rehnquist's misleading (and dishonest, but understandable) characterization of reliance upon text for constitutional analysis as a straw man:

This [an “extraordinary showing of contrary intentions” on the part of the legislature in order to justify abandoning a reliance on the “plain meaning of the language”] is particularly true in construing the jurisdictional provisions of Article III, which speak with a clarity not to be found in some of the more open-textured provisions of the Constitution. See *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646-647 (1949) (Frankfurter, J.,

dissenting); Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 424 (1985) (noting the “seemingly plain linguistic mandate” of the Eleventh Amendment). (p. 116, n. 13)

Somewhat incredulous that the Rehnquist five-member majority seemed to be brazenly flaunting its nonreliance on text in making a constitutional analysis, Justice Souter concluded, “That the Court thinks otherwise [contrariwise to the wisdom and necessity of reliance upon the plain meaning of text] is an indication of just how far it has strayed beyond the boundaries of traditional constitutional analysis” (p. 116, n. 13).

Justice Souter linked the holding in *Union Gas* to a recognition of the limited holding in *Hans*, and then showed the illogical grounding of the Rehnquist majority’s holding in *Seminole Tribe*. First, the linkage between *Union Gas* and *Hans*, as described by Justice Souter. First, he noted, “[T]he *Hans* Court had no occasion to consider whether Congress could abrogate that background immunity by statute” (p. 117). Justice Souter continued:

Indeed ..., this question never came before our Court until *Union Gas*, and any intimations of an answer in prior cases were mere dicta. In *Union Gas* the Court held that the immunity recognized in *Hans* had no constitutional status and was subject to congressional abrogation. (p. 117)

Moving to the case at hand, *Seminole Tribe of Florida v. Florida*, a case which reached a holding contradictory to *Union Gas*, Justice Souter observed:

Today the Court overrules *Union Gas* and holds just the opposite. In deciding how to choose between these two positions [the positions represented by *Union Gas* and *Seminole Tribe*], the place to begin is with *Hans*’s holding that a principle of sovereign immunity derived from the common law insulates a State from federal-question jurisdiction at the suit of its own citizen. (p. 117)

Regarding the Court’s decision in *Hans*, linked critical examination and legal scholarship by observing, “A critical examination of that case will show that it was wrongly decided, as virtually every recent commentator has concluded” (p. 117). In notes referencing his statement,

Justice Souter pointed to multiple law review articles examining the question and noted the summary of another legal scholar's review of the issue:

As one scholar has observed, the literature is “remarkably consistent in its evaluation of the historical evidence and text of the amendment as not supporting a broad rule of constitutional immunity for states.” Jackson, *supra*, [The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 Yale L.J. 1 (1988)], at 44, n. 179). (p. 110, n. 8)

Justice Souter's references to historical and legal scholarship are backed up by Justice Stevens' concurring opinion in *Union Gas* and by Justice Brennan's dissenting opinion in *Atascadero*. As noted by Justice Stevens in his separate concurring opinion in *Union Gas*:

Because Justice Brennan's opinion in *Atascadero* and the works of numerous scholars have exhaustively and conclusively refuted the contention that the Eleventh Amendment embodies a general grant of sovereign immunity to the States, further explication on this point is unnecessary. (491 U.S. 1, 24) (Stevens, J., concurring)

In a note to the above statement, Justice Stevens listed research as published in such distinguished legal journals as the *Yale Law Journal* (two – 1987 & 1988), the *Harvard Law Review* (three – 1976, 1984, & 1989), the *Columbia Law Review* (1983), and the *Stanford Law Review* (1983) which included noted legal scholars Lawrence Tribe and Akhil Reed Amar, among others (491 U.S. 1, 24, n. 1). So, the research conducted by scholars and the legal reasoning employed by Justices Brennan, Stevens, and Souter converged on the assertion that not only was *Hans* wrongly decided, that even being wrongly decided, *Hans* did not represent any generalized constitutional grant of immunity. Justice Souter concluded by noting that the Court's ruling in *Seminole Tribe* simply piled error upon error in a manner that greatly distorted the Eleventh Amendment through judge-made law “untethered” by constitutional text (p. 117). According to Justice Souter:

It follows that the Court's further step today of constitutionalizing *Hans*'s rule against abrogation by Congress compounds and immensely magnifies

the century-old mistake of *Hans* itself and takes its place with other historic examples of textually untethered elevations of judicially derived rules to the status of inviolable constitutional law. (p. 117)

In Justice Souter’s opinion, as well as Justices Stevens, Ginsburg, and Breyer, not to mention Justices Brennan, Marshall, Blackmun, and White (all former justices no longer serving actively on the Court):

Because neither text, precedent, nor history supports the majority’s abdication of our responsibility to exercise the jurisdiction entrusted to us in Article III, I would reverse the judgment of the Court of Appeals [in *Seminole Tribe of Florida v. Florida*]. (p. 185)

*Dissenting opinions.*

The two dissenting opinions, one by Justice Stevens, and one by Justice Souter that was joined by Justices Ginsburg and Breyer, were discussed in the previous section.

***Alden v. Maine, 527 U.S. 706 (1999).***

*Facts & procedural history.*

The facts center on the Fair Labor Standards Act, originally enacted by Congress in 1938 to require “employers to pay a minimum wage” (p. 808). The original FLSA of 1938 contained “an exemption for States acting as employers” (p. 808). The Fair Labor Standards Act was amended in 1966 to remove that exemption “so far as it concerned workers in hospitals, institutions, and schools” (p. 808). Challenged by the State of Maryland, the Court upheld the amended FLSA in *Maryland v. Wirtz* (1968). The FLSA was again amended by Congress in 1974 by “extend[ing] [sic] the minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions” (p. 808, quoting *National League of Cities v. Usery*, 426 U.S., at 836). Again challenged, in *National League of Cities v. Usery* (1976) the Court ruled that the 1974 congressional amendments to the Fair Labor Standards Act constituted “an unconstitutional infringement of state sovereignty,” and in the

process also “overturned *Wirtz*, dismissing its reasoning as no longer authoritative” (p. 808).

Approximately nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority* (1985) the Court “overruled *National League of Cities*, ... this time taking the position that Congress was not barred by the Constitution from binding the States as employers under the Commerce Clause” (p. 809). Thus, the 1974 amendment of the Fair Labor Standards Act became constitutional, including the amended act’s provisions providing for redress of grievances in either federal district court or through the state court system, the latter under the Supremacy Clause of the Constitution whereby it is declared:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding. (U.S. Constitution, Article VI, cl. 2)

In 1992, Alden and sixty-six (66) plaintiffs, all of whom at the time were “present or former state probation officers,” filed suit in the United States District Court for the District of Maine “against their employer, the State of Maine” (*Alden v. State*, 715 A.2d 172, 173; p. 711). The suit by Alden et al “alleged the State had violated the overtime provisions of the Fair Labor Standards Act, ... as amended..., and sought compensation and liquidated damages” (p. 711). While the federal district court was conducting the case, the U.S. Supreme Court’s 5-4 majority decided *Seminole Tribe of Florida v. Florida*, a decision whereby the Court held that “Congress lacks power under Article I to abrogate the States’ sovereign immunity from suits commenced or prosecuted in the federal courts” (p. 712). As a result of the Court’s decision in *Seminole Tribe*, the U.S. District Court for the District of Maine dismissed the suit. Following appeal, the U.S. Court of Appeals for the First Circuit affirmed the lower federal court’s decision in *Mills v. Maine*, 118 F. 3d 37 (CA1, 1997).

Blocked in the federal court system by the Court's ruling in *Seminole Tribe*, Alden et al "filed the same action in state court" (p. 712). The Superior Court, Cumberland County, Maine, dismissed the suit brought by the State of Maine's probation officers "on the basis of sovereign immunity" (715 A.2d 172, 173). Upon appeal, the Supreme Judicial Court of Maine upheld the judgment of the Superior Court, Cumberland County in a 4-2 decision. The majority of the Maine Supreme Court, in *Alden v. State*, held as follows:

State sovereign immunity, as reflected in the Eleventh Amendment, protected the state from state probation officer's FLSA cause of action in its own courts; although Congress may have intended to subject the states to the overtime provisions of the FLSA, it did not have the necessary power, pursuant to the Constitution, to accomplish this end. (715 A.2d 172, 173)

In its opinion, the Maine High Court majority referenced the Court's *Seminole Tribe* opinion referencing the Eleventh Amendment "as reflecting a more fundamental principle of state sovereign immunity," thus repeating the *Seminole Tribe* Court's mistake of not acknowledging that such a view is grounded in the common law doctrine of sovereign immunity and therefore subject to congressional alteration (*Alden v. State of Maine*, 715 A.2d 172, 175). Justice Dana authored a dissenting opinion in *Alden v. State*, which was joined by Justice Rudman. That dissent will be addressed in a subsequent section of this paper's treatment of *Alden v. Maine*.

Upon appeal, the U.S. Supreme Court granted a writ of certiorari, whereupon "[t]he United States intervened as a petitioner to defend the statute" (p. 712). Briefs of *amici curiae* urging the Court to uphold the Maine Supreme Court's decision in *Alden v. State* were submitted by thirty-seven (37) states, including one submitted from Iowa by Attorney General Tom Miller (p. 711, asterisked note). In addition, the National Conference of State Legislatures submitted a brief of *amici curiae* encouraging the Court to uphold the Maine Supreme Court's decision. Only two briefs of *amici curiae* were submitted that argued for reversal of the state supreme

court's decision: one by the Association of American Publishers, Inc.; and one by the National Association of Police Organizations (p. 711, asterisked note).

*Legal question.*

A clear legal question was not presented by the Court's five-member-majority. Neither the Court's syllabus of the case nor the majority opinion, authored by Justice Kennedy and joined by Chief Justice Rehnquist as well as Justices O'Connor, Scalia, and Thomas, hint at a legal question. A legal question may be inferred, however, from the Court's holding. As inferred, that question could be: Do the "powers delegated to Congress under Article I of the United States Constitution ... include the power to subject nonconsenting States to private suits for damages in state courts" (p. 712)? The dissenting opinion, written by Justice Souter and joined by Justice Stevens, by Justice Ginsburg, and by Justice Breyer, offers the same possibility. As inferred from the dissenting opinion's description of the Court majority's holding, the question could be: Does the Constitution bar "an individual suit against a State to enforce a federal statutory right under the Fair Labor Standards Act of 1938 ... when brought in the State's courts over its objection" (p. 760)?

*Legal reasoning of opposing parties.*

Legal arguments were not specifically stated in *Alden v. Maine*. However, they were noted by the Supreme Judicial Court of Maine in its ruling regarding *Alden v. State of Maine*. Since both cases were similar, the arguments as presented by the Maine High Court are pertinent. According to the report of the State of Maine case, Alden "contend[ed] that the doctrine of sovereign immunity may not be interposed to defend against this federally created cause of action [by the FLSA]" (715 A.2d 172, 173). According to the Maine High Court, "Alden

contend[ed] that Congress has abrogated the State’s sovereign immunity by enacting FLSA [under the Commerce Clause’s grant of congressional authority]” (715 A.2d 172, 173).

The State of Maine’s argument was briefly articulated by the Maine High Court: “The State moved for a judgment on the pleadings..., stating as grounds the doctrine of state sovereign immunity...” (715 A.2d 172, 173). Articulated more precisely in the holding of the case by the Maine Supreme Court, the State’s argument may be inferred as the following: “State sovereign immunity, as reflected in the Eleventh Amendment, protect[s] the state from [the] state probation officer’s FLSA cause of action in its own courts” (715 A.2d 172, 173). Continuing, the Court’s report from which the State of Maine’s argument is inferred, argued: “[A]lthough Congress may have intended to subject the states to the overtime provisions of the FLSA, it did not have the necessary power, pursuant to the Constitution, to accomplish this end” (715 A.2d 172, 173).

*Holding & disposition.*

In announcing the first holding, the Court’s syllabus required a full page of verbiage to explain and justify it’s position. As distilled from the lengthy explanation offered in the shortened syllabus (one page in the syllabus compared to nineteen pages in the opinion):

The Constitution’s structure and history and this Court’s authoritative interpretations make clear that the States’ immunity from suit is a fundamental aspect of the sovereignty they enjoyed before the Constitution’s ratification and retain today except as altered by the plan of the Convention or certain constitutional Amendments.... Since the Amendment [the Eleventh] confirmed rather than established sovereign immunity as a constitutional principal, it follows that that immunity’s scope is demarcated not by the text of the Amendment alone, but by fundamental postulates implicit in the constitutional design. (pp. 706-707)

The syllabus was able to condense the Court majority’s second holding more concisely.

According to the Court’s syllabus of *Alden v. Maine*: “The States’ immunity from private suit in their own courts is beyond congressional power to abrogate by Article I legislation” (p. 707).



*Court's rationale.*

As Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, convincingly demonstrates, the Court's rationale simply does not support its holding. Similar to the decision in *Seminole Tribe of Florida v. Florida*, the justices split 5-4 in *Alden v. Maine*. Similar to its approach in *Seminole Tribe of Florida v. Florida*, the Court did not rely upon the text of the Eleventh Amendment for its decision in *Alden v. Maine*. In fact, a reliance upon the Eleventh Amendment would not have supported the Court majority's holding because the subject matter did not involve the federal court system. Instead it involved the court system of the State of Maine, an arena not addressed by the Eleventh Amendment. As Justice Souter noted, "[T]he state forum renders the Eleventh Amendment beside the point" (p. 760). Interestingly, this point served as a primary reason for the dissenting opinion offered by Justice Dana as joined by Justice Rudman, both of whom served on the Supreme Judicial Court of Maine which heard *Alden v. State of Maine*. As Maine Supreme Court Justice Dana pointed out, "[N]either *Seminole Tribe* nor the Supremacy Clause permits the State to interpose its sovereign immunity as a defense to a suit alleging a violation of the Fair Labor Standards Act ... that is maintained in state court" (*Alden v. State of Maine*, 715 A.2d 172, 176). He further explained:

In *Seminole Tribe*, therefore, the Court determined that Congress had exceeded its Article I powers by seeking to expand the jurisdiction of Article III courts beyond the limits imposed by the Eleventh Amendment. That decision provides little guidance as to the proper resolution of this case: state courts are not Article III courts, and "the Eleventh Amendment does not apply in state courts," *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 205; 112 S.Ct. 560; 116 L.Ed.2d 560 (1991). (*Alden v. State of Maine*, 715 A.2d 172, 176)

Therefore, Justice Dana of the Supreme Judicial Court of Maine continued, instead of relying on *Seminole Tribe*, a "different, and in my opinion better, approach is illustrated by the recent decision of the Arkansas Supreme Court in *Jacoby v. Arkansas Department of Education*, 331

Ark. 508, 962 S.W.2d 773 (1998)” (*Alden v. State of Maine*, 715 A.2d 172, 177). Maine

Supreme Court Justice Dana explained, and in doing so, cited decisions in other jurisdictions supporting the explanation provided by the Arkansas Supreme Court:

In *Jacoby*, the court concluded that neither the Eleventh Amendment nor the sovereign immunity provision of the Arkansas Constitution prevents state employees from maintaining an FLSA cause of action against the state in state court. *See id.* At 775-78; *see also Ribitzki v. School Bd. Of Highlands County*, 710 So.2d 226 (Fla. Dist. Ct. App. 1998) (holding that the Eleventh Amendment does not immunize the state from an FLSA action in state court); *Bunch*, 122 Md.App. 437, 712 A.2d 585, (holding that the Supremacy Clause requires state courts to enforce the FLSA against the states and that the scope of states’ sovereign immunity from suit in their own courts is not coterminous with their Eleventh Amendment immunity). (*Alden v. State of Maine*, 715 A.2d 172, 177-178)

Furthermore, as Maine Supreme Court Justice Dana pointed out in his dissent:

The *Jacoby* court [the Supreme Court of Arkansas] determined that the *Seminole Tribe* decision was not conclusive “of state liability in its own courts.” 962 S.W.2d at 777. The court reasoned that pursuant to the Supremacy Clause, the FLSA must be treated as much the law of Arkansas as laws passed by the Arkansas legislature. *See id.* At 775. (*Alden v. State of Maine*, 715 A.2d 172, 178)

Having removed the relevance of the Court’s *Seminole Tribe* ruling for the matter before a state court, and having introduced the Arkansas High Court’s analysis of FLSA, Justice Dana continued:

The court [the Arkansas Supreme Court] observed that “state employees ... are clearly entitled to file FLSA claims against state agencies as employers”; [sic] that “the FLSA expressly provides that state courts have jurisdiction over these claims”; [sic] and that the FLSA is “the law throughout the land, and state sovereign immunity cannot impede it.” *Id.* at 777. (*Alden v. State of Maine*, 715 A.2d 172, 178)

Furthermore, according to Maine Supreme Court Justice Dana, the U.S. Supreme Court had already held the FLSA to be a valid law pursuant to the powers granted by the Commerce Clause contained in Article I, § 8 of the U.S. Constitution. As Justice Dana pointed out:

The Supreme Court has decided that Congress acted within its Article I powers and did not violate the Tenth Amendment when it provided state employees with the protections afforded by the FLSA. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56... Pursuant to the Supremacy Clause, “[t]his [sic] Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.” U.S. Const. art. 6. (*Alden v. State of Maine*, 715 A.2d 172, 178)

Justice Dana, unlike his brethren in the majority of the Maine Supreme Court’s decision in *Alden v. State*, explicitly recognized the common law origins of the doctrine of sovereign immunity and its amenability to change by Congress. As explained by Justice Dana:

To the extent that Maine’s common law doctrine of sovereign immunity conflicts with the provisions of the FLSA which subject the State to liability in state court, the Supremacy Clause resolves that conflict in favor of the FLSA. (*Alden v. State of Maine*, 715 A.2d 172, 178)

Thus, neither the Eleventh Amendment, at least according to its text, nor Article III of the Constitution referencing federal court jurisdiction in the United States, should have applied to *Alden v. Maine* as a State of Maine lawsuit. And, given the Court’s decision in *Garcia* which held the FLSA to be a valid exercise of its powers pursuant to the Commerce Clause of the Constitution, neither should *Seminole Tribe* have applied to the case filed in the Maine state court system. How, then, did the U.S. Supreme Court reach its decision in *Alden v. Maine*?

The dissents authored previously by Justice Souter and by Justice Stevens in *Seminole Tribe* must either have hit their mark with the five majority justices, or they must have hit their mark with the legal scholars and historians around the country, who in turn criticized the five-member majority for their opinion in *Seminole Tribe* (or perhaps both explanations contain particles of truth), because the majority opinion abandoned its reliability on sovereign immunity as a common law doctrine incorporated into the Eleventh Amendment. Of course, this view of

the Eleventh as incorporating the common law doctrine of sovereign immunity had been done without officially recognizing it as a common law grounding because such recognition would have required the subsequent recognition that common law was amenable to congressional change. In part the Court's shift from a sole reliance upon the Eleventh Amendment and what they conceived to be sovereign immunity in *Alden v. Maine* was necessitated because, strictly speaking, the Eleventh Amendment didn't come into particular play in *Alden v. Maine*. So, instead of a discussion grounded in common law without recognition of that fact, and instead of a decision strictly grounded in the Eleventh Amendment, the opinion authored by Justice Kennedy in *Alden v. Maine* relied heavily upon Alexander Hamilton's discussion of sovereign immunity, a discussion grounded not in common law, but in natural law. Of course, natural law had provided the foundation for America's Declaration of Independence and the colonists' discussion of their rights, e.g.:

We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed... (American Declaration of Independence, July 4, 1776)

America's separation from England was grounded neither in common law nor in codified law, but instead fixed its ground of being upon natural law, upon self-evident truths which could be discerned through reason as providing standards and norms for human conduct.

Illustrative of the shift in the Court majority's shift in emphasis, Justice Kennedy's majority opinion only referenced *Hans v. Louisiana* seven (7) times, most of those referencing *Hans'* references to Justice Iredell's dissenting opinion in *Chisholm v. Georgia* or referencing the Court's non-reliance upon the text of the Eleventh Amendment as a guide for their decision in *Hans*. Like a broken record repeating itself, a reiteration of a reiteration of a wrongly-decided

iteration, the five-member majority in *Alden* referenced its own misguided decision in *Seminole Tribe* some ten (10) times in a vain attempt to buttress their holdings in *Alden v. Maine*.

Illustrative of the five-member majority's unannounced reliance upon natural law, the Court's opinion referenced Alexander Hamilton ten (10) times as well. Significantly, those references comprised text citations occupying multiple pages of the majority's opinion.

Justice Souter and the dissenting justices recognized what the five-member majority did not acknowledge, that their opinion was grounded incongruously in natural law (the incongruity will be discussed later in this section). Noting that the Court majority's opinion in *Alden* was not "a mere corollary to its reasoning in *Seminole Tribe*" by which the Court "substituted the Tenth Amendment for the Eleventh as the occasion demand[ed]," Justice Souter observed that the Court majority's "references to a 'fundamental aspect' of state sovereignty" did not refer "to a prerogative inherited from the Crown, but to a conception necessarily implied by statehood itself" (pp. 762, 762-763, 763). Justice Souter continued:

The conception is thus not one of common law so much as of natural law, a universally applicable proposition discoverable by reason. This, I take it, is the sense in which the Court so emphatically relies on Alexander Hamilton's reference in *The Federalist* No. 81, p. 548 (J. Cooke ed. 1961, to the States' sovereign immunity from suit as an "inherent" right, see *ante*, at 716... (p. 763)

Given the fact that the majority did not cite any source more frequently than the writings of Alexander Hamilton, Justice Souter surmised the Court's purpose for exhibiting such a reliance:

I understand the Court to rely on the Hamiltonian formulation with the object of suggesting that its [the Court's] conception of sovereign immunity as a "fundamental aspect" of sovereignty was a substantially popular, if not the dominant, view in the periods of Revolution and Confederation. (p. 763)

Justice Souter then concluded that the Court's purpose in relying so extensively upon Hamilton raised the following fundamental question:

The Court's principal rationale for today's result, then, turns on history: was the natural law conception of sovereign immunity as inherent in any notion of an independent State widely held in the United States in the period preceding the ratification of 1788 (or the adoption of the Tenth Amendment in 1791)? (p. 763)

Justice Souter and the dissenting justices next recognized what the five-member majority did not (at least officially within the majority opinion), that much of Alexander Hamilton's discussion, both in *The Federalist* and in his own papers, was grounded in natural law. As will be shown, such a reliance upon natural law should have had consequences other than those contained within the majority's opinion in *Alden v. Maine*. Justice Souter noted that the majority opinion relied extensively upon Alexander Hamilton, particularly his authorship of "The Federalist No. 81, where he [Hamilton] described the sovereign immunity of the States in language suggesting principles associated with natural law" (p. 773). In conjunction with this observation, Justice Souter cited a lengthy passage from Hamilton's writing (Federalist No. 81) that occupied half of the page in his dissenting opinion. Following the lengthy citation, Justice Souter pointed out:

Hamilton chose his words carefully, and he acknowledged the possibility that at the convention the States might have surrendered sovereign immunity in some circumstances, but the thrust of his argument was that sovereign immunity was "inherent in the nature of sovereignty." (p. 773)

Observing that "the universality of the phenomenon of sovereign immunity, which Hamilton claimed ..., is a peculiar feature of the natural law conception," Justice Souter offered the following analysis:

The apparent novelty and uniqueness of Hamilton's employment of natural law terminology to explain the sovereign immunity of the States is worth remarking, because it stands in contrast [1] to formulations indicating no particular position on the natural-law-versus-common-law origin, [2] to the more widespread view that sovereign immunity derived from common law, and [3] to the more radical stance that the sovereignty of the people made sovereign immunity out of place in the United States. (p. 774)

Observantly, Justice Souter pointed to the incongruity between the Court majority's use of Hamilton's views and the reception those same views received early on in the Supreme Court at the time in which the Framers of the Constitution actually lived as contemporaries of Hamilton, contemporaries who well understood Hamilton's thinking:

Hamilton's view is also worth noticing because, in marked contrast to its prominence in the Court's opinion today, as well as in *Seminole Tribe* ... and in *Hans v. Louisiana*, ... it found no favor in the early Supreme Court, see *infra*, at 781. (pp. 774-775)

In referring to "the early Supreme Court" (see above), Justice Souter was referencing the views expressed by the Supreme Court justices in *Chisholm v. Georgia*. Justice Souter noted that Hamilton's natural law discussions regarding sovereign immunity were completely absent in the *Chisholm* decision:

If the natural law conception of sovereign immunity as an inherent characteristic of sovereignty enjoyed by the States had been broadly accepted at the time of the founding, one would expect to find it reflected somewhere in the five opinions delivered by the Court in *Chisholm v. Georgia*, 2 Dall. 419 (1793). Yet that view did not appear in any of them. (p. 781)

Since the Court majority had also tried to imbue the Tenth Amendment with natural law status in its majority opinion, Justice Souter examined *Chisholm* to see if it contained any such references, particularly given the close proximity between the adoption of the Tenth Amendment and the *Chisholm* decision.

And since a bare two years before *Chisholm*, the Bill of Rights had been added to the original Constitution, if the Tenth Amendment had been understood to give federal constitutional status to state sovereign immunity so as to endue it with the equivalent of the natural law conception, one would be certain to find such a development mentioned somewhere in the *Chisholm* writings. (p. 781)

Announcing the results of his examination of all of the *Chisholm* opinions aimed at detecting any references either to Hamilton's natural law conception of sovereign immunity or to the Tenth Amendment as embodying sovereign immunity, Justice Souter declared:

In fact, however, not one of the opinions espoused the natural law view, and not one of them so much as mentioned the Tenth Amendment. Not even Justice Iredell, who alone among the Justices thought that a State could not be sued in federal court, echoed Hamilton or hinted at a constitutionally immutable immunity doctrine. (Emphasis added) (p. 781)

Perhaps there was evidence that a natural law doctrine of sovereign immunity existed in the colonies prior to the Constitution. Upon examining the colonial charters, Justice Souter noted that none of the colonies enjoyed sovereign immunity, "that being a privilege understood in English law to be reserved for the Crown alone" (p. 764). He further stated, "Several colonial charters, including those of Massachusetts, Connecticut, Rhode Island, and Georgia, expressly specified that the corporate body established thereunder could sue and be sued" (p. 764). Justice Souter quoted Justice Joseph Story's observation that "antecedent to the Declaration of Independence, none of the colonies were, or pretended to be, sovereign states" (p. 764).

What were the views regarding sovereign immunity for the states immediately following the Declaration of Independence? Justice Souter discovered a mix of opinions in the new state constitutions commencing with the Revolution.

Connecticut and Rhode Island adopted their pre-existing charters as constitutions, without altering the provisions specifying their suability... Other new States understood themselves to be inheritors of the Crown's common law sovereign immunity and so enacted statutes authorizing legal remedies against the State parallel to those available in England [e.g.,]... petition of right or the *monstrands de droit* in the Chancery or Exchequer. (pp. 769-770)

Virginia, New York, and Pennsylvania adopted the latter versions of English law providing for redress against the state on the part of their own citizens (pp. 770-771). What about the practice



of including declarations of inalienable rights in the new state constitutions? Did such natural law declarations contain similar declarations regarding sovereign immunity? Justice Souter announced the results of his examination of state constitutions:

[D]espite a tendency among the state constitutions to announce and declare certain inalienable and natural rights of men and even of the collective people of a State..., no State declared that sovereign immunity was one of those rights. To the extent that States were thought to possess immunity, it was perceived as a prerogative of the sovereign under common law. And where sovereign immunity was recognized as barring suit, provisions for recovery from the State were in order, just as they had been at common law in England. (p. 772)

Perhaps there was widespread agreement regarding sovereign immunity at the state conventions called to ratify the new Constitution. According to Justice Souter's summary of his examination:

[A] diversity of views with respect to sovereignty and sovereign immunity existed at the several state conventions, and this diversity stands in the way of the Court's assumption that the founding generation understood sovereign immunity in the natural law sense as indefeasibly "fundamental" to statehood. (p. 776, n. 16)

As just one example of a founding father, constitutional framer, and Supreme Court Justice who expressed views contrary to the assumptions of the Rehnquist Court, Justice Souter cited James Wilson's remarks at the Pennsylvania Convention:

Upon what principle is it contended that the sovereign power resides in the state governments? The honorable gentleman has said truly, that there can be no subordinate sovereignty. Now, if there cannot, my position is, that the sovereignty resides in the people; they have not parted with it; they have only dispensed such portions of the power as were conceived necessary for the public welfare. (p. 777)

As another prominent example, this time from a founding father, Revolutionary War general, and constitutional framer located south of the later-to-be-named Mason-Dixon Line in a state whose name later came to be synonymous with state rights, Justice Souter cited the following:

At the South Carolina Convention, General Charles Cotesworth Pinckney ... took the position that the States never enjoyed individual and unfettered

sovereignty, because the Declaration of Independence was an act of the Union, not of the particular States. In his view, the Declaration “sufficiently confutes the ... [sic] doctrine of the individual sovereignty and independence of the several states.... [sic] The separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots who framed this Declaration ... as ... it was intended to impress this maxim on America, that our freedom and independence arose from our union, and that without it we could neither be free nor independent.” *Ibid.* (p. 777, n. 17)

Having searched the historical record for evidence supporting the Court’s claims that sovereign immunity was widely understood to be a fundamental aspect of statehood at the time of the nation’s founding and at the time the Constitution was framed and ratified, a conception that was based upon natural law, Justice Souter could find no evidence to support the Court’s position. Having conducted a search that included an examination of colonial charters, of colonial thought about the colonies and sovereign immunity, of the state constitutions emerging after the Declaration of Independence, of the records of the Constitutional Convention, of the debates of the various state conventions called to ratify the Constitution, and having examined the remarks of all the Supreme Court justices who participated in *Chisholm v. Georgia*, Justice Souter concluded:

It is clear enough that the Court has no historical predicate to argue for a fundamental or inherent theory of sovereign immunity as a limiting authority elsewhere conferred by the Constitution or as imported into the Constitution by the Tenth Amendment. (p. 795)

What of the idea of sovereign immunity, grounded in natural law, being applicable in the sense that the five-member majority in *Alden* envisioned it? Can a theory of sovereign immunity grounded in natural law be used to block a federal-question suit in either a state or a federal court? In a word, no! So, even if they had been able to find historical evidence to support their claim (they couldn’t, remember), they still couldn’t have logically used such a claim to block a suit grounded in federal law. Why? The answer lies in the locus of sovereignty as traditionally

conceived prior to the American's recognition that sovereignty resides in the people.

Traditionally, sovereignty resided with the sovereign who was regarded as the source of law.

Sovereign immunity then protected the source of law from being sued, as explained in common

law terminology. While the common law and natural law conceptions of sovereign immunity

have a common subject matter and can be juxtaposed in many conversations, they each possess

"distinct foundations" (p. 768). Justice Souter pointed to the natural law foundation of sovereign

immunity as discussed by Justice Oliver Wendell Holmes in *Kawananakoa v. Polyblank*, 205

U.S. 349 (1907). According to Justice Holmes:

A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. *Kawananakoa, supra*, at 353. (p. 796)

Justice Souter noted that the authorities cited by Justice Holmes in his *Kawananakoa* opinion

"stand in the line that today's Court purports to follow," one of whom was Hobbes. Justice

Souter included one of Justice Holmes' citations of Hobbes' discussion of the natural law

doctrine of sovereign immunity, a portion of which follows:

The sovereign of a Commonwealth, be it an assembly or one man, is not subject to the civil laws. For having power to make and repeal laws, he may, when he pleaseth, free himself from that subjection by repealing those laws that trouble him.... Nor is it possible for any person to be bound to himself, because he that can bind can release; and therefore he that is bound to himself only is not bound. *Leviathan*, ch. 26, § 2, p. 130. (p. 797)

As Justice Souter pointed out:

"The 'jurists who believe in natural law' ... would not have faulted him for seeing the consequence of their position: if the sovereign is not the source of the law to be applied, sovereign immunity has no applicability. Justice Holmes indeed explained that in the case of multiple sovereignties, the subordinate sovereign will not be immune where the source of the right of action is the sovereign that is dominant. See *Kawananakoa*, 205 U.S., at 353, 354 (District of Columbia not immune to private suit, because private

rights there are “created and controlled by Congress and not by a legislature of the District”). (pp. 797-798)

In other words, in *Alden v. Maine* where the law “proceeds from the national source, whose laws authorized by Article I are binding in state courts, sovereign immunity cannot be a defense” (p. 798). Since FLSA is a law enacted by Congress, under the natural law doctrine of sovereign immunity, only Congress can claim immunity from suit. The State of Maine, not being the source of the law represented by FLSA, can not invoke sovereign immunity. Thus the natural law doctrine of sovereign immunity has no applicability in such a case. As Justice Souter observed:

After *Garcia v. San Antonio Metropolitan Transit Authority* [holding that FLSA was a valid utilization of the Article I Commerce Clause power], Justice Holmes’s logically impeccable theory yields the clear conclusion that even in a system of “fundamental” state sovereignty immunity, a State would be subject to suit *eo nomine* [sic] in its own courts on a federal claim. (p. 798)

Given that the text of the Constitution as amended does not provide justification for the doctrine of sovereign immunity articulated by the Rehnquist Court, that Court must find the source and ensuing justification for the its use of that doctrine in either common law or in natural law. Justice Souter commented on the “trap of Holmes logic” which rendered the five-member majority’s judicial position untenable no matter which source they chose for the origin of the doctrine of sovereign immunity:

There is no escape from the trap of Holmes’s logic save recourse to ... the doctrine of sovereign immunity ... of the common law. But if the Court admits that the source of sovereign immunity is the common law, it must also admit that the common law doctrine could be changed by Congress acting under the Commerce Clause. It is not fro me to say which way the Court should turn; but in either case it is clear that Alden’s suit should go forward. (p. 798)

Regarding the Rehnquist Court's misuse and misunderstanding of both the common law (*Seminole Tribe*) and natural law (*Alden v. Maine*) doctrines of sovereign immunity, which somehow, in some mysterious manner, co-opted the Tenth Amendment for purposes other than its plain language indicates, Justice Souter concluded:

The sequence of the Court's positions [*Seminole Tribe* and *Alden*] prompts a suspicion of error, and skepticism is confirmed by scrutiny of the Court's efforts to justify its holding. There is no evidence that the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood, and not evidence that any concept of inherent sovereign immunity was understood historically to apply when the sovereign sued was not the font of the law. (p. 761)

Regarding the Court's argument that its decision had a "structural basis in the Constitution's creation of a federal system," that sovereignty immunity for states "inhere[d] in the system of federalism established by the Constitution," that argument was "demonstrably mistaken" according to Justices Souter, Stevens, Ginsburg, and Breyer (pp. 798, 798-799, 799). The American founders who framed the U.S. Constitution "split the atom of sovereignty" and established "two political capacities, one state and one federal," thereby creating a government based on federalism ("our Nation's own discovery") which "owed its existence to the act of the whole people who created it" (*U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779, 838, 839) (Kennedy, J., concurring). Justice Souter noted that the overall plan of "delegated sovereignty ... between the two component governments of the federal system was clear, and was succinctly stated by Chief Justice Marshall" (p. 800). According to Chief Justice Marshall's description of federalism:

In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. *McCulloch v. Maryland*, 4 Wheat. 316, 410 (1819). (p. 800)

It was precisely the descriptions of federalism by Chief Justice Marshall and Justice Kennedy that revealed “the flaw in the Court’s appeal to federalism,” according to Justice Souter (p. 800).

He continued:

The State of The State of Maine is not sovereign with respect to the national objectives of the FLSA. It is not the authority that promulgated the FLSA, on which the right of action in this case depends. That authority is the United States acting through the Congress, whose legislative power under Article I of the Constitution to extend FLSA coverage to state employees has already been decided, see *Garcia v. San Antonio Metropolitan Transit Authority*, *supra*, and is not contested here. (p. 800)

Justice Souter continued to apply the scheme of federalism contained in the plain language of the U.S. Constitution to the facts of *Alden v. Maine*.

Maine has created state courts of general jurisdiction; once it has done so, the Supremacy Clause of the Constitution, Art. VI, cl. 2, which requires state courts to enforce federal law and state-court judges to be bound by it, requires the Maine courts to entertain this federal cause of action. (p. 801)

Justice Souter concluded: “The Court’s insistence that the federal structure bars Congress from making States susceptible to suit in their own courts is, then, plain mistake” (p. 801). Finally, in a note to the statement just cited, Justice Souter turned the Court’s argument for federal structure against itself. Addressing the Rehnquist Court’s expressed concern that without its version of sovereign immunity, the federal government would “ultimately ... commandeer the entire political machinery of the State against its will and at the behest of individuals,” Justice Souter drew the Rehnquist Court’s attention to a fundamental principle of America’s scheme of government when he aptly pointed out:

But this is to forget that the doctrine of separation of powers prevails in our Republic. When the state judiciary enforces federal law against state officials, as the Supremacy Clause requires it to do, it is not turning against the State’s executive any more than we turn against the Federal Executive when we apply federal law to the United States: *it is simply upholding the rule of law*. There is no “commandeering” of the State’s resources where

the State is asked to do no more than enforce federal law. (Emphasis added)  
(p. 801, n. 34)

Finally, there is the matter of the various stratagems and techniques employed by the Rehnquist Court in *Alden v. Maine* to divert attention away from the critical matters at hand and to focus attention elsewhere through the use of various, at best, argumentative tricks, at worst, propaganda techniques, much in the same fashion as gamblers operated the proverbial shell game in the saloons and gambling halls of America's nineteenth-century river boats and western frontier towns. Deftly moving and forever shielding the shell which covers the pea, the Rehnquist Court has substituted specious rhetoric for sound judicial reasoning and has mounted attacks to divert attention from its own lack of textually-based argument and from the absence of sound constitutional analysis in its own argument. Just a few examples should suffice to demonstrate the unsoundness of the Rehnquist Court's approach to jurisprudence. An astute and critical reader will be able to locate more than what is discussed in the material which concludes the analysis of *Alden v. Maine*.

First, the Rehnquist Court committed a type of red herring fallacy when it tried to counter the dissent's references to sovereign immunity as deriving from either the common law or from natural law (See Appendix M for discussion of various propaganda techniques). After falsely characterizing the argument of sovereign immunity's origins in either common law or natural law as a "false dichotomy" (the false characterization constituting an "unsupported claim"), the majority opinion drew the red herring across the trail of argument in a manner that also utilized the propaganda technique of suppressed evidence as follows:

The text and the structure of the Constitution protect various rights and principles. Many of these, such as the right to trial by jury and the prohibition on unreasonable searches and seizures, derive from the common law. The common-law lineage of these rights does not mean they are defeasible by statute or remain mere common-law rights, however. They

are, rather, constitutional rights, and form the fundamental law of the land.  
(p. 733)

The red herring is the argument that the rights listed, which had their origin in the common law, are now constitutional rights in much the same manner that the Court is trying to make sovereign immunity a constitutional right. This argument has no relevance to the issue of sovereign immunity being derived either from the common law or the natural law. The suppressed evidence lies in the fact that although the right to trial by jury has a common law origin, its constitutional stature derives not from any structure of the Constitution, but from being one of the few common-law rights specifically addressed in the Constitution. Article III, § 2, cl. 3 specifically states:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed. (U.S. Constitution, Article III, § 2, cl. 3)

The fact of trial-by-jury's origin in common law nor from any constitutional structure, but from the explicit text of the Constitution. Likewise, the same holds true for the prohibitions against unreasonable searches and seizure. Although possessing an origin in common law, the explicit text of the Constitution, not the document's structure, provides the grounding for its status as a constitutional right. As stated in the Fourth Amendment to the Constitution as part of the Bill of Rights adopted subsequent to the Constitution's ratification:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (U.S. Constitution, Amendment IV)

Where one expects to find sound constitutional analysis and judicial reasoning, one instead encounters a series of propaganda techniques employed in dizzying fashion in the space of a few



sentences. If by propaganda, one refers to “a message presentation aimed at presenting an agenda that fails to paint a complete picture,” the Court’s opinion in *Alden v. Maine* contains propaganda (See Appendix M, SourceWatch). The agenda is the Court’s efforts to constitutionalized the doctrine of sovereign immunity. The complete picture the Rehnquist Court wishes to distract attention from include the lack of a textual basis for its argument, the origins of the doctrine of sovereign immunity in either the common law or natural law, the views of original intent expressed by those closest to the adoption of the Eleventh Amendment, the full historical record of American colonists’ and the nation’s Founders’ understanding of sovereign immunity, and the basic incompatibility between the doctrine of sovereign immunity and a constitutional republic whereby sovereignty rests with the people.

Second, the Rehnquist Court utilized a false premise from which it concluded that sovereign immunity should have immutable constitutional status. The false premise consisted of the following:

The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.... Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified. (pp. 715-716)

Justice Souter summarized the evidence demonstrating the falseness of the premise upon which the Rehnquist Court based its holding. First, Justice Souter introduced the Court’s claim and described the scope of his investigation into the evidence, in this case, the lack of evidence to support the Court’s premise, thus demonstrating its falseness:

There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable. Whether one looks at the period before the framing [of the Constitution], to the ratification controversies, or to the early republican era [following the framing and ratification of the Constitution], the evidence is the same. (p. 764)

Next, Justice Souter reviewed the findings of his investigation into the historical evidence:

Some Framers thought sovereign immunity was an obsolete royal prerogative inapplicable in a republic; some thought sovereign immunity was a common law power defeasible, like other common law rights, by statute; and perhaps a few thought, in keeping with a natural law view distinct from the common law conception, that immunity was inherent in a sovereign because the body that made a law could not logically be bound by it. (p. 764)

And then, Justice Souter concluded, “Natural law thinking on the part of a doubtful few will not, however, support the Court’s position” (p. 764).

Third, the Court in a modified *ad hominem* attack, misrepresented the evidence and made a false claim. According to the Rehnquist Court’s opinion:

In an apparent attempt to disparage a conclusion with which it disagrees, the dissent attributes our reasoning to natural law. We seek to discover, however, only what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system. We appeal to no higher authority than the Charter which they wrote and adopted. (p. 758)

The *ad hominem* attack has the virtue of also acting as a red herring, drawing attention from the fact that the Court, not able to base its position on the text of the Constitution, was discussing sovereign immunity either in terms of its common law or its natural law grounding, an activity with consequences that would destroy the Court’s position if recognized. The misrepresentation of evidence lies in the second sentence cited above. The Court was not seeking to discover what the Framers thought. The Rehnquist Court only wished to discover thought which supported its position and to disregard all thought countering said position (see previous discussion). The false claim occurs in the final sentence of the above quotation. No textual basis existed in the “Charter” to support the Rehnquist Court’s position; thereby rendering moot the assertion regarding an “appeal to no higher authority than the Charter” (p. 758). Finally, Justice Souter countered the Court’s characterization of the dissent’s purpose. As stated by Justice Souter:

The Court says that to call its approach “natural law” is “an apparent attempt to disparage,” *ante*, at 758. My object, however, is not to call names but to show that the majority is wrong, and in doing that it is illuminating to explain the conceptual tradition on which today’s majority draws, one that can be traced to the Court’s opinion from its origins in Roman sources. (p. 767, n. 6)

Fourth, the Rehnquist Court misconstrued the historical record by making a false assertion that, in turn, was used to make an unsupported claim. This occurred in the context of examining the “historical record” to determine “the founding generation’s intent” regarding sovereign immunity (p. 741). The attorneys for Alden et al. had argued that the Founder’s were silent on the subject, and thus provided “no instruction” regarding the matter (p. 741). The Rehnquist Court’s response follows:

We believe, however, that the Founders’ silence is best explained by the simple fact that no one, not even the Constitution’s most ardent opponents, suggested the document might strip the States of the immunity. In light of the overriding concern regarding the States’ war-time debts, together with the well-known creativity, foresight, and vivid imagination of the Constitution’s opponents, the silence is most instructive. It suggests the sovereign’s right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution. (p. 741)

As will be shown by noting Justice Souter’s response, the Rehnquist Court misconstrued the historical record by suppressing evidence countering its assertion. In addition, Justice Souter demonstrated the logical fallacy regarding its assertion of an unsupported claim, that being the Court’s interpretation of the so-called “silence” of the Founders. First, Justice Souter countered the Court’s misinterpretation of the historical record and its false assertion regarding any thought being given to the idea that a States’ immunity could be stripped by drawing the Court’s attention to the remarks of James Wilson. Justice Souter observed, “In fact, a stalwart supporter of the Constitution, James Wilson, laid the groundwork for just such a view at the Pennsylvania Convention, see *infra*, at 777-778” (p. 772, n. 12). As Justice Souter noted:

Wilson laid out his view that sovereignty was in fact not located in the States at all: “Upon what principle is it contended that the sovereign power resides in the state governments? The honorable gentleman has said truly, that there can be no subordinate sovereignty. Now, if there cannot, my position is, that the sovereignty resides in the people; they have not parted with it; they have only dispensed such portions of the power as were conceived necessary for the public welfare.” *Id.*[2 Elliot’s Debates], at 443. (p. 777)

Justice Souter continued to refute the Court’s distorted historical record analysis and the resulting false assertion that no one of the Framers had contemplated the absence of state immunity from suit. According to Justice Souter’s analysis of James Wilson’s remarks that were made at the Pennsylvania Convention to ratify the Constitution:

While this statement [the preceding remarks made by Wilson, cited immediately preceding] did not specifically address sovereign immunity, it expressed the major premise of what would later become Justice Wilson’s position in *Chisholm*: that because the people, and not the States, are sovereign, sovereign immunity has no applicability to the States. (pp. 777-778)

Justice Souter next focused attention upon the Court’s unsupported claim regarding the so-called silence of the Framers’ regarding sovereign immunity. Providing a different interpretation to the issue of “silence,” Justice Souter observed:

For the most part, it is true, the surviving records of the ratifying conventions do not suggest that much thought was given to the issue of suit against States in their own courts. But this silence does not tell us that the Framers’ generation thought the prerogative so well settled as to be an inherent right of States, and not a common law creation. It says only that at the conventions, the issue was not on the participants’ minds because the nature of sovereignty was not always explicitly addressed. (p. 772, n. 12)

Fifth, the Rehnquist Court mischaracterized parts of James Wilson’s remarks so as to diminish his importance in the eyes of the unwary reader, the end result being part of an *ad hominem* attack aimed to marginalize and discredit. First, it should be noted, it would be most difficult to identify anyone who played a greater role in the nation’s founding. James Wilson

was a signer of the Declaration of Independence, a member of the Second Continental Congress, a delegate to the Constitutional Convention in Philadelphia which framed the Constitution of the United States, a delegate to the Pennsylvania Convention to ratify the Constitution, and finally, a Supreme Court justice. These experiences created a select peer group for James Wilson. While his activities thus present an impressive resume, what of the quality of his participation in those activities. At the Constitutional Convention, Wilson “played a part second only to James Madison’s” (Hall, 1992, p. 933). Wilson also served as the leader of the ratification campaign in Pennsylvania (Hall, 1992, p. 933). However, in order to preserve its fabricated jurisprudence, the Rehnquist Court could not acknowledge James Wilson without being forced to abandon its constructed position. Hence, its disparagement of Wilson. According to the Rehnquist Court, “Wilson and Pinkney expressed a radical nationalist vision of the constitutional design that not only deviated from the views that prevailed at the time, but despite the dissent’s apparent embrace of the position, remains startling even today” (p. 725). In response, Justice Souter pointed to the remark that the Court construed as “radical” (p. 725). Wilson’s remark was made at the Pennsylvania Convention to ratify the Constitution and expressed “his hostility to any idea of state sovereign immunity” (p. 776). As described by Justice Souter, “For Wilson, [t]he [sic] answer [was] [sic] plain and easy: the government of each state ought to be subordinate to the government of the United States” (p. 776). Next, Justice Souter, in the manner of a professor correcting a student’s mistaken reasoning, drew attention to the faulty characterization on the part of the Rehnquist Court:

The Court says this statement of Wilson’s is “startling even today,” *ante*, at 725, but it is hard to see what is so startling, then or now, about the proposition that, since federal law may bind state governments, the state governments are in this sense subordinate to the national. (p. 776, n. 16)

Concluding, Justice Souter noted the incongruity between the Court's incredulity and the original purpose for the Constitutional Convention that resulted in the current Constitution's inclusion of the Supremacy Clause:

The Court seems to have forgotten that one of the main reasons a Constitutional Convention was necessary at all was that under the Articles of confederation Congress lacked the effective capacity to bind the States. The Court speaks as if the Supremacy Clause did not exist or *McCulloch v. Maryland*, 4 Wheat. 316 (1819), had never been decided. (p. 776, n. 16)

At the same time, Justice Souter took the opportunity to call particular attention to the Court's other attempts to discredit Wilson. As noted by Justice Souter:

Finally, the Court calls Wilson's view "a radical nationalist vision of the constitutional design," *ibid.*, apparently in an attempt to discount it. But while Wilson's view of sovereignty was indeed radical in its deviation from older conceptions, *this hardly distanced him from the American mainstream*, and in October 1787, Washington himself called Wilson "as able, candid, & honest a member as any in Convention," 5 Papers of George Washington: Confederation Series 379 (W. Abbot & D. Twohig eds. 1997). (Emphasis added) (p. 776-n. 16)

Wilson's remarks, while radical in terms of their difference from previous political theory, were not different from the American mainstream of thought that "split the atom of sovereignty" and created a system of federalism that was "unprecedented in form and design" (*U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779, 838 (1995), Kennedy, J., concurring). Wilson's remarks, instead of being heeded by the Court, represented a portion of the historical record that the Rehnquist Court either ignored or disparaged because it directly contradicted the Court's desires.

Sixth, the Rehnquist Court, situated near the close of the twentieth century, had the cheek to accuse the Justices of the early republic, situated within four years of the Constitution's ratification and within six years of its framing, of failing to fully understand sovereign immunity. And just who were the Supreme Court justices the Rehnquist Court was accusing of failure?

Two (John Jay & James Wilson) served in the Second Continental Congress that authorized the

Declaration of Independence. One (James Wilson) signed the Declaration of Independence. Two (John Blair, Jr. & James Wilson) participated in the Constitutional Convention of 1787 in Philadelphia. Three (John Blair, Jr., William Cushing, & James Wilson) played significant roles in their state conventions to ratify the Constitution (in Virginia, Massachusetts, & Pennsylvania, respectively). One (John Jay) authored three of the essays contained in the *Federalist* which played an important role in the campaign to ratify the newly framed Constitution. One (Jay) served as the nation's first Chief Justice of the United States Supreme Court. One (William Cushing) served as a delegate to the state convention which drafted the Massachusetts Constitution of 1780, the country's first political document that combined the doctrine of separation of powers with the doctrine of judicial review to form an institutional check on abuses of sovereignty and which declared that the citizens of Massachusetts would be governed by "a government of laws, not of men" in answer to Aristotle's ancient question (Massachusetts Constitution of 1780, Art. XXX).

To get back to the statement that such men failed to understand sovereign immunity as it was understood in their own time – labeling such an act by the Rehnquist Court to be a false premise seems to somewhat understate the situation by ignoring either the unmitigated gall or the desperate need to legitimize an unsound position that prompted such an utterance by the Rehnquist Court in *Alden v. Maine*. According to the Rehnquist Court's majority opinion, "First, despite the opinion of Justice Iredell, *the majority failed to address* either the practice or the understanding [of sovereign immunity] that prevailed in the States at the time the Constitution was adopted" (Emphasis added) (p. 721). Rather, as Justices Brennan, Stevens, Souter, Ginsburg, and Breyer have noted (not to mention a host of historians and legal scholars who have extensively researched and have written authoritative accounts of the historical record in

question), the Rehnquist Court distorted the historical record with such a statement – it chose the wrong verb to characterize the justices’ decisions in *Chisholm*. It was not that the justices hearing *Chisholm* “failed to address the practice or the understanding” regarding sovereign immunity, it was that they *chose* not to, and with good reason, as an unbiased examination of the historical record shows (p. 721).

Seventh, the Rehnquist Court uniquely combines logical fallacy and an unwarranted claim in a futile attempt to support their conclusion in *Alden v. Maine*. The unwarranted claim, noted by Justice Souter, involved a logical fallacy based upon sovereign immunity and the Tenth Amendment.<sup>121</sup> First, the logical fallacy, whose first three propositions are presented below, followed by the mistaken conclusion which gives rise to the logical fallacy:

- A. States were sovereign entities prior to the Constitution (itself, a questionable assertion capable of refutation).
- B. Sovereign entities, by virtue of their sovereignty, enjoy sovereign immunity.
- C. The Tenth Amendment to the Constitution reserved certain sovereign powers to the states.
- D. Ergo, the Tenth Amendment reflects a basic understanding that the states have a constitutionally-based sovereign immunity from all lawsuits (except those generated by the specific powers generated by Amendment XIV, § 5).

Of course, as has already been shown, Justice Souter demolished the idea that anyone viewed the Tenth Amendment in such a fashion. However, that viewpoint of the Rehnquist Court derived from the logical fallacy demonstrated above. Furthermore, the Rehnquist Court used that logical fallacy to make its unwarranted claim, that the Framers understood the Tenth Amendment in such a misconstrued fashion. Following Justice Souter’s examination of the record, most



particularly, the views of ALL the justices in *Chisholm v. Georgia*, including that of Justice Iredell who dissented and upon whom the Rehnquist Court placed great reliance, Justice Souter concluded that “[n]ot a single Justice suggested that sovereign immunity was an inherent and infeasible right of statehood” and further noted that not even the legal counsel for Georgia or Justice Iredell “conceived the possibility that the new Tenth Amendment produced the equivalent of such a doctrine” (p. 789). Although not characterizing the Court’s view as an unwarranted claim, in actual fact it was, as Justice Souter demonstrates:

This dearth of support makes it very implausible for today’s Court to argue that a substantial (let alone a dominant) body of thought at the time of the framing understood sovereign immunity to be an inherent right of statehood, adopted or confirmed by the Tenth Amendment. (p. 789)

To make matters worse (from the Rehnquist Court’s viewpoint), Justice Souter pointed to two early Court cases whereby states “voluntarily subjected themselves to suit in the Supreme Court around the time of *Chisholm*” (p. 789, n. 25) (See Appendix Y for further discussion of these two cases named below). After noting the source of his information (“See Marcus & Wexler, *Suits Against States: diversity of Opinion in the 1790s*, 1993 J. Sup. Ct. Hist. 73, 74-78” [p. 789, n. 25]), Justice Souter continued to demolish the Rehnquist Court’s assertion regarding thought about sovereign immunity in the early republic by pointing out the following:

At the Court’s February Term, 1791, before *Chisholm*, Maryland entered a plea (probably as to the merits in *Van Staphorst v. Maryland*, see 1993 J. Sup. Ct. Hist., at 74, a suit brought by a foreign citizen for debts owed by the State, but then settled the suit to avoid the establishment of an adverse precedent on immunity, see *id.*, at 75. In *Oswald v. New York*, an action that commenced before *Chisholm* but that was continued after it, New York initially objected to jurisdiction, see 1993 J. Sup. Ct. Hist., at 77, but the suit was tried to a jury in the Supreme Court, and after New York lost, it paid the full jury verdict out of the State’s treasury, *id.*, at 78. (p. 789, n. 25)

Of course, if one still needs more evidence beyond that provided by Justice Souter in his dissenting opinion as joined by Justices Stevens, Ginsburg, and Breyer, such a reader should feel free to consult Appendix Y of this paper.

*Concurring/dissenting opinions.*

Justice Souter authored a dissenting opinion that was joined by Justice Stevens, by Justice Ginsburg, and by Justice Breyer. This dissent was discussed somewhat thoroughly in the previous section of this case, *Alden v. Maine*.

**Summary of Salient Points**

To overcome the embarrassing fact that no textual basis exists in the U.S. Constitution to support the Court's current position *vis á vis* the Eleventh Amendment, the Court has needed to find some historical evidence to support its position, an act that turned out to be futile. The Rehnquist Court's search for a historical record significantly misread and distorted the record, particularly when compared with the work of both historians and legal scholars. Besides misreading the record, the Rehnquist Court ignored the testimony of those closest to the events, e.g., the five Supreme Court justices authoring opinions in *Chisholm* and the Marshall Court's statements regarding original understandings and intent of the Eleventh Amendment, statements uttered in *Cohens v. Virginia* (1821) and in *Osborn v. Bank of United States* (1824). If two people's views should have been given priority (given their participation in the Revolutionary War, the Constitutional Convention, and their state's convention to ratify the Constitution), it should have been James Wilson of Pennsylvania and Charles Cotesworth Pinckney of South Carolina.

The Rehnquist Court's attempt in *Seminole Tribe* to incorporate the common law doctrine of sovereign immunity into the Eleventh Amendment was either based on ignorance or upon

deceit. The Rehnquist Court's subsequent attempt to incorporate the natural law doctrine of sovereign immunity ignored the fact that it was a natural law doctrine they were trying to incorporate, again, either through ignorance or deceit. Such a position, it must have been hoped by the Court, would allow them to escape the horns of a dilemma – on the one hand, trapped by the logic of Justice Oliver Wendell Holmes discussion of natural law under which the State of Maine was unable to assert a claim of sovereign immunity; on the other hand, trapped by the implications of common law being amenable to change by congressional action as represented by both the Indian Gaming Regulatory Act and the Fair Labor Standards Act. However, even if the five-member majority of the Rehnquist Court could have found historical evidence to support their contention (again, it couldn't without distorting and misconstruing the record it selected while ignoring significant portions of the historical record that contradicted its position), the Rehnquist Court could not have overcome the philosophic grounding in either the common law or natural law, a grounding which rendered their own position groundless and thus without merit.

At some future point in time, the Supreme Court will once again apply sound principles of constitutional analyses to its Eleventh Amendment jurisprudence. When the Court does examine the historical record in an unbiased fashion without having a pre-determined outcome in mind, when the Court does ground its interpretation in the text of the Constitution, when the Court does realize the incongruity between the concept of sovereign immunity and the original American contribution to political thought whereby sovereignty was located in the people of the United States, when the Court does demonstrate its understanding of the improper grounding of the *Hans* decision along with subsequent Rehnquist Court decisions as simple illogical reiterations of a mistaken iteration, at that point, the Court will need look no further for previous, properly construed judicial analyses than the dissenting opinions of Justice Brennan in

*Atascadero* and *Green v. Mansour*, of Justice Stevens' concurring opinion in *Union Gas* and dissenting opinion in *Seminole Tribe*, and of Justice Souter's dissenting opinions in *Seminole Tribe* and *Alden v. Maine*.

Interestingly, Justices Souter, Stevens, Ginsburg, and Breyer expressed hopes that a future Court would find itself abandoning the indefensible positions taken by the Rehnquist Court. Drawing a comparison between the Rehnquist Court and the *Lochner* Court at the beginning of the century in the dissenting opinion of *Alden v. Maine*, Justice Souter (the author of the dissenting opinion which was joined by Justices Stevens, Ginsburg, and Breyer) observed:

The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking. The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew increasingly fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution. I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in *laissez-faire*, the one being as unrealistic as the other, as indefensible, and probably as fleeting. (527 U.S. 706, 814) (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.)

A distinguished professor of law and renowned legal scholar at one of the nation's most prestigious law schools noted that the modern Court's approach to the Eleventh Amendment was most generally represented by the five-member majority in *Seminole Tribe of Florida v. Florida*.

He observed:

Four justices have sharply dissented from this approach. See *ibid.*, 76-100 (Stevens, J., dissenting), 100-85 (Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.). Most legal scholars have tended to side with the dissenters. A great deal of this scholarship (including my own) is analyzed and synthesized in Justice Souter's comprehensive dissent. (Amar, 2005, p. 336, n. 31, at p. 598)

Regarding the same Eleventh Amendment jurisprudence discussed in the quotation above, Professor Akhil Reed Amar pointed out that the Rehnquist Court stretched the words of the

Eleventh Amendment “beyond all recognition” in order to arrive at “fact patterns far beyond the amendment’s text” (Amar, 2005, p. 336). He continued:

Instead of respecting the Constitution’s general theme of popular sovereignty, today’s Court has exalted *governmental* sovereignty and in fact made it harder for twenty-first-century Americans to achieve redress [for governmental wrongs] than it ever was in eighteenth-century England. Instead of honoring the celebrated common-law maxim that “for every right, there should be a remedy,” the modern Court seems intent on insisting that for many a right there must be no remedy. Sovereignty means never having to say you’re sorry. (Emphasis in original) (Amar, 2005, p. 336)

The Court’s fabrication of a constitutional doctrine of sovereign immunity has no modern-day parallel unless one examines the governments of such totalitarian regimes as Nazi Germany, Stalinist Russia, and Maoist China. Such a comparison reveals how un-American the doctrine of sovereign immunity is and how ill-suited it is to the democracy of a constitutional republic wherein sovereignty resides in the people. In his dissenting opinion in *Alden v. Maine*, joined by Justices Stevens, Ginsburg, and Breyer, Justice Souter drew attention to the incompatibility between a nation whose sovereignty resides in the people and the doctrine of sovereign immunity. Following a discussion of the idea of sovereign immunity as flowing from a notion of “royal dignity” as discussed by Blackstone (the noted English authority on the common law), Justice Souter noted:

It would be hard to imagine anything more inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own. (*Alden v. Maine*, 527 U.S. 706, 802) (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.)

However, the present ill-suited state of affairs will continue until new justices are appointed to the Court who will see the wisdom of basing Eleventh Amendment jurisprudence on a soundly solid legal foundation similar to that constructed by the four dissenting justices of *Seminole Tribe* and *Alden v. Maine*, dissents which, in turn, built upon previous dissents authored by Justice

Brennan in *Atascadero State Hospital v. Scanlon* and *Green v. Mansour* as well as the majority opinion of Justice Brennan and the companion concurring opinion of Justice Stevens in *Pennsylvania v. Union Gas Company*.

## **Chapter 9**

### **Findings & Conclusions of the Research, Recommendations for Further Research, And Concluding Thoughts**

#### **Introduction**

This dissertation is premised on the assumption that a review of the case law relating to federalism would yield an answer to the primary research question centered on constitutional federalism and the No Child Left Behind Act (NCLB). Components of federalism emerged from a review of the literature that centered thinking on four areas of investigation: the Guarantee Clause, the Tenth Amendment, the Eleventh Amendment, and the Fourteenth Amendment. Deeper probing in the literature review revealed cases that constituted a major portion of the case law for each area of investigation. These cases were subsequently examined in order to yield answers to the primary question. The research framework utilized in examining the case law of federalism flowed from the structure of legal analysis. The particular framework used in this study was developed by triangulating the analyses of: 1) the structure of law review articles; 2) the structure of dissertations focused on addressing legal questions; and 3) recommendations by law professors. This was subsequently checked by examining recommendations by legal scholars in works about conducting legal research.

Secondary questions centered on investigating whether or not NCLB was grounded in systems thinking (as articulated by Senge) and in adaptive work (Heifetz). An additional research question centered on federalism as a public policy approach. Systems thinking as articulated by Senge contains the following components: mental model, personal mastery, shared vision, and team learning. Systems thinking attempts to identify all of the components impacting a particular system and then address those components exhibiting a negative impact on the

system.. Without a systems view, one focuses attention on symptoms rather than identifying and addressing underlying problems. According to Heifetz, adaptive work is the work required “to diminish the gap between the values people stand for [leaving no child behind] and the reality they face [achievement gaps in student learning]” (Heifetz, 1994, p. 22). Engaging in adaptive work requires identifying the beliefs and values that need to be modified so they no longer prevent or inhibit constructive work to diminish gaps between ideals and current realities. Federalism as a public policy approach was defined as a federal-state partnership that is forged in order to solve a major problem in America in a manner that:

- involves meaningful input at both the state and the federal levels;
- promotes citizen involvement at the local level; and that
- engages in experimental work to determine the most effective means by which a complex problem can best be solved.

In addition, a qualitative study was conducted that focused on the views of the two state leaders of public education in hopes of shedding light on the three research questions. Dave Christensen of Nebraska and Ted Stilwill of Iowa held their positions as public education leaders of their respective states during a period of time that reached from before NCLB was conceived to its legislative enactment until after it was to have been implemented in their state systems of public education. Their views are to be found in Chapter Two of this study.

Finally, this study attempted to provide a full historical context for each of the components of constitutional federalism, i.e., the Guarantee Clause, as well as the Tenth, Eleventh, and Fourteenth Amendments to the U.S. Constitution. An intentional action borne of previous engagement in research and study, the discussion of historical context flows from a conviction that one can not fully understand a subject or occurrence without understanding the



context in which it occurred or was developed. In other words, text without context provides a poor basis for the full comprehension and understanding required for analysis and application in that interesting intersection of legal facts and principles, on the one hand, and, on the other hand, the subject matter of life. Not understanding context forecloses a complete conception of possible uses today as well as inhibits a full comprehension of the impact of past developments on today's society. More importantly, not understanding context forecloses a full understanding of why something is not applicable or useful for addressing specific situations and developments in the Twenty-first Century. For example, comprehending the development of the doctrine of sovereign immunity, combined with a full understanding of America's unique contribution of political theory in creating a federalism wherein sovereignty resides in the people, synergize to form the key for future Eleventh Amendment jurisprudence. When one adds to the preceding an understanding of America's continuing answer to a question first posed by Aristotle centuries ago, which in turn constitutes an obligation to continue answering Aristotle's question in a vein similar to the past, one fully appreciates the current state of Eleventh Amendment jurisprudence. Eleventh Amendment jurisprudence provides only one example illustrating the importance of historical context. Many readers have doubtless discovered more. It is hoped that the various historical contexts provided in this research acted to enhance the reader's full understanding of the components of constitutional federalism and their bearing on current issues.

### **Research Questions**

Four research questions were posed for the purpose of guiding the investigation into possible intersections between federalism and the No Child Left Behind Act. The questions are posed separately below. The answers to the research questions will be provided in the findings presented subsequent to the questions.

**Primary research question.**

Do portions of the No Child Left Behind Act that represent federal action violate any of the constitutional provisions governing federalism?

**Secondary research questions.**

Does NCLB take a systems approach to ensuring that no child gets left behind in America when viewed through the lens of Senge's systems perspective?

Given the goal of NCLB and the incongruence between the goal of ensuring that no children are left behind and the current reality in America whereby achievement gaps exist between classes of students grouped by race and socioeconomic status, does NCLB utilize adaptive work as articulated by Heifetz in order to close the gap between America's current reality and the goal of NCLB?

Does NCLB represent a public policy approach based upon federalism in which the states are viewed as co-partners and as laboratories of experimentation engaged in finding solutions to a complex problem?

**Findings and Conclusions Derived From the Research**

**Findings & conclusions related to the primary research question.**

***Finding no. 1.***

NCLB is an exercise of congressional conditional spending derived from Article I, § 8.

***Discussion.***

Of all the cases examined in the Tenth Amendment chapter, NCLB most closely resembles the cases examined related to conditional spending whereby Congress conditions the state use of federal money on state acceptance of the conditions contained within the federal

legislation. The Court spelled out the tests to be applied to conditional spending legislation for determination of constitutionality in *South Dakota v. Dole*.

*Conclusion.*

As such, the best constitutional challenge could be one based on the nature of the legislation being challenged. Examination should be made of Tenth Amendment case law that is focused on the conflict between the Tenth Amendment and the Spending Clause of the Constitution. Particular attention should be given to those cases utilizing Tenth Amendment arguments centered on the judicially-constructed tests that must be employed for legislation to pass constitutional muster.

***Finding no. 2.***

NCLB arguably fails one or more of the conditional spending tests articulated in *South Dakota v. Dole*, 483 U.S. 203 (1987).

*Discussion.*

The Relevant Relationship Requirement presents the most obvious choice of the conditional spending tests infringed by NCLB. The vital question here centers on the relationship of the conditions to the purpose of funding allocations. Federal aid to education is supportive. Specifically, Title I focuses on providing extra instruction to students who are behind their peers in reading and/or math. Although some limited funding has been made available to students of middle and high school age, the majority of funding has targeted students in the elementary grades. That is the purpose. The conditions go far beyond a remediation purpose, however. Conditions to be met in order to receive Title I funds now include meeting targets for middle and high school student proficiencies in reading, math, and science; requiring states to hold public schools accountable for meeting student achievement proficiency targets at

the elementary, middle school, and high school levels; requiring every state to administer the National Assessment of Educational Progress to a sample of students; requiring the states to oversee a system of escalating sanctions to schools not deemed to be performing well by the federal government; and requiring states to abandon their own system of attendance requirements in favor of the federal law creating choice for students in schools not deemed to be performing well by the federal government. These requirements have no relationship to the remedial needs of elementary students in reading and math. The line between educational assistance and educational control has been crossed by Congress.

The second conditional spending test to be examined centers on the Constitutional Bar Requirement. A constitutional bar might consist of a combination of arguments based on both the Guarantee Clause and the Tenth Amendment. The challenge to NCLB would not be made on the basis of either the Guarantee Clause or the Tenth Amendment. Either used by itself would be defeated, in this writer's opinion, by arguments based on previous successful defenses of conditional spending challenges. Instead the challenge is based on an argument that the combination of the two constitutional provisions acts to form a bar that must be passed in order for conditional spending to be constitutional. Arguably the threshold for challenges based on violations of a constitutional bar as part of conditional spending is lower than the threshold for a bar based solely on the Guarantee Clause or the Tenth Amendment that don't implicate the conditional spending arguments. Such an argument is implied by the Court's inclusion of a constitutional bar requirement as one of the tests for conditional spending. Neither the Guarantee Clause nor the Tenth Amendment, in and of themselves, require inclusion in a list of tests to evaluate the constitutional muster of conditional spending. They each have been, and still remain, quite capable of operating on their own. Inclusion in a separate list of tests for

conditional spending implies a lower threshold for their use in evaluating the constitutionality of such legislation.

Education is not mentioned in the U.S. Constitution. Education is, however, specifically mentioned in all 50 state constitutions (McCoy, pp. 1-11). Nor has education been designated an implied power of the U.S. Constitution. Education is, however, a specified responsibility for state governments as spelled out in state constitutions. For example, Article IX, Section 1 of the State Constitution of Iowa declares, “The educational and school funds and lands shall be under the control and management of the general assembly of this state.” Article IX, Section 3 of the State Constitution of Iowa reads, “The general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement.” And finally, Article IX, Section 6 of the State Constitution declares, “The financial agents of the school funds shall be the same, that by law, receive and control the state and county revenue for other civil purposes, under such regulations as may be provided by law.” Other state constitutions contain similar features. Furthermore, the U.S. Supreme Court has recognized that “education is perhaps the most important function of state and local governments” (347 U.S. 483, 493). No judicial opinion by the High Court has countermanded that assertion. In fact, quite the opposite has proven to be the case as numerous court decisions in the past fifty (50) years have cited precisely that statement.

Being “the most important function of state and local governments,” primary control over education is a critical aspect of those governments’ functioning under a republican form of government. State expenditures for education in most, if not all, states constitute a major portion of their budgets. In Iowa, expenditures for education represent more than 60% of the state’s total budget in any given year. Furthermore, the Court’s discussion of the Guarantee Clause in *Baker*

*v. Carr* merits consideration. According to the Court, “[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question” (369 U.S. 186, 209). A state’s responsibility for the system of public education constitutes a political responsibility; therefore, it does not present a political question. In the same case, the Court noted analytical tests to be applied to detect the presence or absence of a political question (369 U.S. 186, 217; see also the summary portion of this paper’s Guarantee Clause chapter). Application of those tests to the present argument presents no presence of a political question. Furthermore, in questions related to education, the Supreme Court has recognized that state efforts to provide a free and public system of education to the children of state residents should be “scrutinized under judicial principles sensitive to the nature of the State’s efforts and to the rights reserved to the States under the Constitution” (411 U.S. 30, 39). Furthermore, a republican form of government surely includes the ability to legislate meaningfully about a topic. NCLB forecloses some of the most meaningful aspects of education from state and local control. In addition, the Supreme Court has recognized the necessity for states and local boards to exert primary responsibility over education because their judgments are more informed by knowledge of localized needs.

According to the Court:

[T]his case also involves the most persistent and difficult questions of educational policy, another area in which this Court’s lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. (411 U.S. 30, 42)

Lastly, a republican form of government surely includes meaningful involvement of citizens, particularly at the local and state levels. This, too, has been recognized by the Court when it declared:

The merit of local control was recognized last Term in both the majority and dissenting opinions in *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972). Mr. Justice Stewart stated there that “[d]irect control over

decisions vitally affecting the education of one's children is a need that is strongly felt in our society." *Id.*, at 469. The Chief Justice, in his dissent, agreed that "[l]ocal control is not only vital to continued public support of the schools, but it is of over-riding importance from an educational standpoint as well." *Id.*, at 478. (411 U.S. 30, 49)

The preceding form the basis for constructing legal arguments uniting Guarantee Clause and Tenth Amendment positions to form an impassible constitutional bar for NCLB under the Constitutional Bar Requirement for conditional spending. Neither the Guarantee Clause nor the Tenth Amendment act on their own to form a constitutional barrier. They act jointly. The constitutional barrier created does not act on its own, but does act as a test under the conditional spending requirements jurisprudence. Together, the Guarantee Clause and the Tenth Amendment constitute a test that is impassible for NCLB. An additional constitutional bar centers on the conditional spending tests acting jointly. If Congress wishes to assert direct federal control over public education in America, it must do so explicitly in a manner that specifies the constitutional justifications for its action. The conditional spending tests act as a constitutional bar to *de facto* control of public education in the absence of *de jure* control.

Finally, consideration may need to be given to the Absence of Financial Coercion Requirement as a possible line of argument. Two economic factors in particular should be examined. The first involves analyzing the current economic condition of the state and of a particular school district. Particular factors at the district level to be analyzed for their impact include low, zero, or negative allowable growth in state aid to public schools, state funding cuts implemented after the fiscal year has gotten under way, district budget deficits, district's spending authority being negative, and low or negative district solvency ratios. While most Title I budgets constitute less than 5% of a district's general fund, these factors may raise the Title I portion to a higher percentage. At the state level, the loss of Title I funds used by the state

department of education for operational costs should be calculated against the state allocation for operating the state's department of education. When state funding is low, that percentage may implicate the Financial Coercion Requirement.

The second economic factor to be examined centers on just what federal funds would be impacted by a refusal to accept Title I funds under NCLB. If federal funding for other categories are withdrawn as well, e.g., school lunch funds, special education funds, other federal title program funds, then a situation would be created whereby the loss of federal funds conditioned by a school or state's refusal to accept Title I funding would constitute financial coercion.

Finally, it's unclear at this point whether an individual school district can refuse Title I funds. Individual school districts could be bound by decisions made at the state level. This is a situation that will probably vary from state to state because of differences in state constitutions and state legislation creating, funding, and maintaining the public education system within its state borders.

#### *Conclusion.*

Using the *amicus curiae* brief submitted by attorneys for the National Conference of State Legislatures in *South Dakota v. Dole* as a model, a federalism challenge to NCLB could be mounted which argues that the law fails the Relevant Relationship Requirement and the Constitutional Bar Requirement needed in order to pass constitutional muster as a valid exercise of conditional spending. Depending upon what federal funding is withheld when a test case is conducted and upon what a state or district's financial condition is, consideration may need to be given to utilizing the Absence of Financial Coercion Requirement as well.

#### *Finding no. 3.*



A strong argument can be made that, within the first two years of its passage, NCLB did violate the conditional spending test relating to knowledgeable choice.

*Discussion.*

Both state directors of education in Nebraska and Iowa confirmed that no one fully understood the requirements and implications of the law, neither the congressional legislators who voted for it, nor the educational officers at the state level responsible for its implementation, nor the education officials at the federal level, nor the teachers and administrators at the local level charged with implementing its requirements. Having been constructed behind closed doors, few legislators had read the 1,000+ pages of the law on which they were voting. Any acceptance by state education officials was not based on a knowledgeable choice, but instead on a trust that things would be made clear in the near future and that it would all work out in the end. After all, the goal was a noble one, a fact that made it difficult for dedicated educators to oppose.

*Conclusion.*

Had a state been prepared, it might have filed for an injunction delaying the implementation of the law in their state until the full law's requirements and consequences could be fully communicated and understood. The argument for the injunction would have been based on the knowledgeable choice portion of the conditional spending tests required for legislation to pass constitutional muster under a Tenth Amendment conditional spending challenge.

***Finding no. 4.***

Historically, the Guarantee Clause has been used by the federal government to justify action against the states. It has never been used to nullify federal action.

*Discussion.*

The argument (the Guarantee Clause should be used to overturn legislation because it negatively impacts the state's republican form of government) is easy to make logically, but difficult to construct judicially. The hurdle lies in a set of clear-cut standards by which to mark the moment when a government crosses the line demarcating the difference between a republican and a non-republican government. Also, the historical background presents an added barrier to overcome. Only two cases have intimated that the Guarantee Clause would justify judicial scrutiny of congressional action, while the historical record, the text, and the location of the Guarantee Clause in the Constitution combine to make a convincing argument against such scrutiny.

*Conclusion.*

The Guarantee Clause holds out remote hope as the basis for a federalism challenge to NCLB. However, it might be used in conjunction with the Tenth Amendment arguments centering on the conditional spending tests, which act to preserve federalism. It could be argued that a joint Guarantee Clause-Tenth Amendment challenge (not mounted separately as part of a constitutional challenge, but jointly under the particular conditional spending test relating to the constitutional bar) will preserve a republican form of government in the state. In this manner you have a legal argument that seeks to preserve both federalism and a republican form of government.

*Finding no. 5.*

The Fourteenth Amendment acts to restrain state governments, not the Federal Government.

*Discussion.*

This finding is easily verified by examining the text of the amendment and by reviewing the case law of the Fourteenth Amendment. The Fourteenth Amendment has never been used to overturn congressional legislation. Instead, the Fourteenth Amendment has overturned state legislation, has restrained state executive action, and has compelled state action to provide the equal protection of the laws and due process to individuals.

*Conclusion.*

The Fourteenth Amendment offers little possibility for use in either mounting or supporting a federalism-based challenge to NCLB.

***Finding no. 6.***

The historical record of America's political and judicial life contains a thread of experience representing a continuous answer to Aristotle's ancient question ("Which is preferable in government – the rule of law or the rule of an individual?"), an answer that declares the rule of law is not only preferred, but required.

*Discussion.*

Beginning in 1776, America's political answers to Aristotle's question consisted of the following responses: Tom Paine's *Common Sense*, the Declaration of Independence, the Massachusetts Constitution of 1780, the multiple activities contained in the framing, debating and approving the U.S. Constitution, Lincoln's Gettysburg Address, and Watergate Special Prosecutor Archibald Cox's actions in the aftermath of the Saturday Night Massacre of October 21, 1973. America's judicial answers to Aristotle's question, which declared that the rule of law would prevail over the rule of individuals, are represented by the following: Chief Justice Marshall in *Marbury v. Madison* (1803), the U.S. Supreme Court in *Yick Wo v. Hopkins* (1886), the U.S. First Circuit Court of Appeals in *United States v. Butler* (1936), the U.S. District Court

for the District of New Hampshire in *Chimento v. Stark* (1973), both Judge Sirica's federal district court ruling and the federal circuit court's ruling in *In re Subpoena to Nixon* (1973), and by the U.S. Supreme Court in *United States v. Nixon* (1974). America's response to Watergate Special Prosecutor Archibald Cox's use of Aristotle's question also uncovered the Roman response to that same question, a response inscribed in American court house and law school architecture, "*Fiat justitia, ruat coelum*," interpreted to read "Let Justice be done, though the Heavens fall" (White, p. 5).

#### *Conclusion.*

It is incumbent upon us as citizens to insist that the our nation continue to answer Aristotle's question in the same vein as this paper's research indicates it has been answered previously, that the rule of law is preferred over the rule of individuals unconstrained by the law.

#### *Finding no. 7.*

The concept of sovereign immunity contravenes both America's original contribution to political thought (creating a unique form of federalism wherein sovereignty resides in the people) and America's answer to Aristotle's question declaring that the rule of law is preferable to the rule of individuals.

#### *Discussion.*

In America true sovereignty resides in the people. Given both the final text of the preamble to the Constitution and the actions taken at the Constitutional Convention, the inescapable conclusion is that the people, not the states, are the "real sovereign source of the Constitution" (Rossiter, p. 229; see also Alexander Hamilton in Federalist No. 78; James Madison's actions and statements at the Constitutional Convention in Farrand, I, pp. 22, 122-123, 214; revised preamble to the Constitution by the Framers in Farrand, II, pp. 177, 553-554,

651; Corwin, 1965, p. 89; Wills, 1981/2001, pp. 131-134; Daniel Webster's arguments in *McCullough*, 17 U.S. 316, 326; William Pinkney's arguments in *McCullough*, 17 U.S. 316, 377-378; Chief Justice Marshall's opinion in *McCullough*, 17 U.S. 316, 402-405, 432; *In re Subpoena to Nixon*, 487 F.2d 700, 711). The idea that the people of the United States are the ultimate sovereigns flows from the Declaration of Independence as well. It is illogical to apply the idea of sovereign immunity to a system of government wherein sovereignty resides in the people. Who would the people be immune from – themselves?

The other component of America's uniquely original contribution to political thought resides in the creation of a federal system which divided governing power between two levels of government – state and federal. It was described most recently by Supreme Court Justice Arthur Kennedy who metaphorically compared America's creation of federalism to the success of modern physicists in splitting the atom. First, Justice Kennedy noted the sovereignty of the American people by observing, "In my view, however, it is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system" (*U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838, (1995) (Kennedy, J., concurring)). Justice Kennedy continued:

Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution crated a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. (514 U.S. 779, 838 (1995) (Kennedy, J., concurring))

To review, federalism is a unique creation in dividing governing power between two levels of government while identifying sovereignty as residing in the people. The doctrine of sovereign

immunity is both disrespectful to America's genius and inapplicable in such a unique system of government.

Finally, America's answer to Aristotle's question declares that a government of laws is preferable to the rule of individuals. In a political system identifying itself as a government of laws, no individual is above the law. Nor is any government official. Nor is any division of government. With sovereignty residing in the people, with all people being equal, and with the government being a government of laws, no thing or person is above the law. Hence, the doctrine of sovereign immunity is inapplicable in such a unique political system as was created by American genius.

#### *Conclusion/*

The doctrine of sovereign immunity constitutes an antithesis to the thesis posed by America's original contribution to political thought and by America's answer to Aristotle's ancient question.

#### ***Finding no. 8.***

The use of propaganda techniques by conservative justices to reach a predetermined end (that of finding ways to limit delegated powers contained in Article I, § 8) in Tenth and Eleventh Amendment jurisprudence marks that jurisprudence as judge-made law (much in the common-law tradition of England) with no textual basis in the Constitution. Furthermore, the current judicial interpretations of the Tenth and Eleventh Amendments ignore accepted judicial procedures of constitutional analysis.

#### *Discussion.*

This finding is based on the examination of both Tenth Amendment and Eleventh Amendment case law, particularly those cases featuring opinions by Justice/Chief Justice

Rehnquist, Justice Scalia, Justice Powell, and Justice O'Connor. Both amendments could conceivably be used to challenge the effect of NCLB, which amounts to federal control over education. The argument could note that the effect of NCLB runs counter to the recognition by the Court that "education is perhaps the most important function of state and local governments" (*Brown v. Board of Education*, 347 U.S. 483, 493). The argument could point out that federal control over education runs counter to the evidence provided by a comparative textual analysis of state constitutions and the U.S. Constitution. Education is explicitly referred to in state constitutions whereby the state assumes responsibility for creating, funding, and maintaining a system of public education; education is not mentioned once in the U.S. Constitution. The argument could conclude by stating the "structure of the Constitution" concept undergirding current Tenth and Eleventh Amendment jurisprudence would prohibit federal control over education. Parts of the argument have a textual grounding in the Constitution while other parts do not as they are grounded in judge-made law constructed through dishonest means. It would prove irresistible to a results-oriented attorney to separate the two types of arguments. As a result, in the end, such a legal challenge to NCLB would be dishonest and reflect an answer to Aristotle's ancient question that is unacceptable – that answer being that the rule of men (judge-made law constructed by devious means) is preferable to the rule of law.

#### *Conclusion.*

Current Tenth and Eleventh Amendment jurisprudence, being judge-made law that uses faulty techniques of construction, is built on a base of shifting sand (the structure of the Constitution as interpreted by whatever a majority of justices may decide). As such, it provides a poor ethical, logical, and legal basis upon which to mount a federalism challenge to NCLB.

#### **Findings & conclusions related to the secondary research questions.**

***Finding no. 1.***

Poverty exerts a primary force upon education that is negative, that acts as a fundamental factor impacting the system of children's well-being in America, and that stands for the lack of a key to unlock the gates barring a young person's ability to fully benefit from education.

***Discussion.***

Research findings, most of which were presented in Chapter Four of this study, conclusively demonstrate this finding. For example, researchers analyzing the difference in achievement scores from the First International Mathematics Study discovered that "virtually all of the variation in mean test scores can be predicted by the child poverty rate" (Jaeger, p. 122). Narrowing in on the topic for greater specificity, researchers uncovered evidence demonstrating that approximately 60% of the variation in achievement scores could be "predicted by [narrowing in on] the poverty rate among children in single-parent households" (Jaeger, p. 122). In another study by the Education Research Center in Ireland, researchers discovered that poverty provided a critical link to poor literacy performance. The report identified "the number of children ... with serious reading difficulties" to be "between 25 and 30 percent," a figure that correlated to the child poverty rate of 25% (Flynn, p. 7). The effects of poverty on children's ability to learn were spelled out:

[O]ne in four children in Ireland lives in families where the household income is half of the national average income. This translates into children coming to school hungry, poorly dressed, no books, no money for extras. Is it any wonder there are reading difficulties when this is the daily reality for so many children? Food and clothing, not books, are the priorities here. (Flynn, p. 7)

Another researcher, having reviewed existing research studies and after conducting his own analysis of SIMS, TIMSS, and NAEP data sets, concluded, "Child poverty is both a huge social problem in our country and an obvious generator of educational difficulties" (Biddle, p. 11).



Numerous studies confirm the link between socioeconomic status and student achievement.

Socioeconomic status constitutes a major key to one's ability to fully benefit from education.

*Conclusion.*

Constitutional federalism challenges will not matter in the absence of a systemic approach to confront the negative influences of poverty on the system of children's well-being in America.

***Finding no. 2.***

NCLB focuses on a symptom (student achievement gaps) and ignores a significant underlying cause of those gaps (poverty).

*Discussion.*

No Child Left Behind focuses on the event of non-learning which it defines as a score on a single exam that falls below an arbitrary criterion. It then uses these scores to identify achievement gaps, which if not narrowed over time, result in sanctions and penalties. As stated previously, much of the score variations in student achievement can be explained by child poverty. However, NCLB does not address the systemic causes of child poverty. Instead, it focuses on the symptoms of child poverty, the event of non-learning heavily influenced by poverty. NCLB's approach is typical of efforts to apply linear thinking to complex non-linear situations by not viewing it holistically. It focuses attention upon the symptom, not the cause. According to Peter Senge:

[T]he causes of many pressing issues, from urban decay to global ecological threat, lay in the very well-intentioned policies designed to alleviate them. These problems were "actually systems" that lured policymakers into interventions that focused on obvious symptoms, not underlying causes, which produced short-term benefit but long-term malaise, and fostered the need for still more symptomatic interventions. (Senge, pp. 14-15)

As Senge noted, “[V]ision without systems thinking ends up painting lovely pictures of the future with no deep understanding of the forces that must be mastered to move from here to there” (Senge, p. 12). Senge further cautioned, “Without systems thinking, the seed of vision falls on harsh soil” (Senge, p. 12).

This finding also explains why the issue of dollars spent on education is irrelevant to the real issue at hand. The real issue is the dollars spent lifting families with children out of poverty. Only after that does it make sense to discuss the dollars spent on education. Dollars spent on education, while important, still represents only one part of the total system impacting children’s well-being, a system greatly impacting student learning.

*Conclusion.*

NCLB provides a prime example of Senge’s warning regarding the lack of a systems approach to a systemic problem that results from focusing upon a symptom while ignoring the symptom’s cause.

***Finding no. 3.***

NCLB ignores the system of children’s well-being in America.

*Discussion.*

The approach used by the No Child Left Behind Act, a focus upon achievement gaps, ignores the shortcomings of other systems impacting the well-being of children in American society. These include, but are not limited to, poverty, quality child care in families of working parents, health care, and universal preschool. From birth until age eighteen, children and young people spend slightly more than 8% of their total life in the classroom (See Appendix G). Yet NCLB places responsibility for the success or failure of children to learn solely on public

education and ignores the systems impacting the remaining 92% of children's lives during the formative and emerging periods of their lives.

An editorial in the *Des Moines Register* discussed the problems of quality child care for low-income families with working parents. Discussing the situation of latchkey children who leave for school after their parents have reported to work and who arrive home before their parents' work day is completed, the *DMR* Editorial-page Staff stated:

The problem is that society feels little responsibility for making sure good child care is available or for assisting lower-income families who can't fit the cost of good child care into their budgets. It is not just those receiving welfare or just off welfare who struggle with this. Why is Iowa so stingy? ... Instead of treating children as treasures, we treat them as liabilities. (*Des Moines Register* Editorial-page Staff, p. 4AA)

As pointed out just previously under *Finding No. 1* and *Finding No. 2*, poverty has a huge impact upon student learning and negatively affects the system of children's well-being in America. Thus, the system of children's well-being has a huge impact upon student achievement in this country.

The failure to systemically address the multiple systems bearing on the well-being of American children has several consequences. First, the success in achieving the goal of NCLB will be limited as other systems impacting children's well-being will not be addressed in any major fashion. Second, and more important, by not recognizing the important role of other systems, we will not be making the fundamental changes that need to occur in order for America to be recognized as a society that places primary value upon the nation's children. Third, we will be delaying the start of the adaptive work that needs to occur in order for us to realize the promise of America to its children, that no child will be left behind.

*Conclusion.*

Until the system of children's well-being is fully addressed, gaps in student achievement will persist.

***Finding no. 4.***

NCLB does not utilize a systems approach: 1) because it treats a symptom, not the cause; 2) because it ignores the impact of poverty upon learning; 3) because it ignores the system of children's well-being; and 4) because it does not incorporate Senge's requirements for systems thinking in a learning community.

***Discussion.***

According to Senge, systems thinking is "a discipline of seeing wholes" and "a framework for seeing interrelationships rather than things, for seeing patterns of change rather than static 'snapshots'" (Senge, p. 68). As stated previously, NCLB treats a symptom, not the cause. Besides not acknowledging the impact of poverty upon learning, NCLB ignores the whole system of children's well-being. NCLB focuses upon a series of snapshots in the forms of annual tests and ignores the systems or processes that greatly impact the content of the individual snapshots. As discussed in Chapter Four of this study, NCLB has serious flaws when analyzed according to the disciplines comprising Senge's view of systems thinking – mental models, personal mastery, shared vision, team learning, and systemic thinking. All of Senge's disciplines reveal problems with NCLB from a systems perspective, particularly the discipline centered upon the learning community concept which is critical for the success of public policy in terms of creating ownership. Also, neither of the state directors of public education in their states (Doug Christensen, Nebraska; Ted Stilwill, Iowa) viewed NCLB as embodying a systems approach to improving public education.

More particularly, NCLB lacks a systems perspective in terms of viewing education as interacting with and dependent upon other systems impacting children and families, particularly regarding the negative force exerted by poverty. The shortcomings of those systems and their effect upon education are ignored by NCLB.

*Conclusion.*

Revisions of NCLB should represent part of a comprehensive effort to address the problems of poverty, to focus upon improving the system of children's well-being in America, and to create a learning community focused upon a systems approach to children's well-being, a system of which education is only one part.

***Finding no. 5.***

NCLB does not represent a public policy approach based upon federalism.

*Discussion.*

The prescriptive approach of the No Child Left Behind Act runs counter to Iowa's and other states' educational practice of local control. Rather than reflecting policy and leaving the implementation details to the local level, NCLB is highly prescriptive in detailing what each state will do. As such, it utilizes a top-down, my-way-or-the-highway approach that has little to do with using federalism to foster a cooperative effort. Doug Christensen, Nebraska's Commissioner of Education, pointed to local control as the primary reason education worked as well as it did in the rural midwestern and northeastern states. Ted Stilwill, Director of the Iowa Department of Education when NCLB was inaugurated, also noted that local control was integral to implementing change in Iowa's public schools. According to Stilwill:

And in Iowa, we have excellent evidence that in fact pride is more effective in change, and school districts in Iowa do well because they are invested in their kids, and they care about what happens to them, and they feel good about what happens to them. (Stilwill, p. 6)

The prescriptive, top-down approach focused on compliance instead of a partnership between knowledgeable professionals produced some sense of frustration at the state level as well. According to Doug Christensen:

That, to me, just speaks volumes about the incapacity of this law to generate leadership, because it's "Follow the letter of the law." We fill out workbooks, for gosh sakes. I mean, we had to fill out an AYP workbook. Makes you feel like a child. Makes you feel like, "Well, why don't they just fill it out and then we'll sign it," instead of going through this charade of us filling it out and letting them sign it. I don't think they grasp the notion that you can't generate leadership and discretion and decision-making at a local policy level from afar. (Christensen, p. 3)

The top-down approach, prescriptive approach was responsible, in both Christensen's and Stilwell's eyes, for a one-size-fits all viewpoint that created weak points in the law. NCLB did not recognize critical differences between the different educational systems in place across the country; nor did NCLB recognize critical differences in different groups of learners within each public educational system. Federalism as a public policy approach would have avoided that because of the input made by the state and local partners. The lack of a federalism centered on partnerships with the states also resulted in creating animosity towards the federal government, particularly with its draconian approach, e.g., the system will only improve through top-down action imposed from outside the system, and through the imposition of sanctions and penalties for failure to achieve the legislation's purpose. In 2004, Arne Duncan, Chicago Public Schools Superintendent, criticized NCLB as follows:

It infuriates me when bureaucrats in Washington make laws and set rules that make no sense and, in the end, harm kids. The way this law is being implemented creates disincentives and discourages those who are trying to do the right thing. It is wrong morally and intellectually, and it harms public education. (Banchero & Little, p. 9)

Of course, this criticism was uttered by Duncan before newly-elected President Barack Obama tapped him to be his Secretary of Education in the aftermath of the 2008 elections. The lack of a federalism centered on partnerships that promoted collaborative work at all levels also ignored the possibilities discussed by Senge concerning systems thinking:

[Systems thinking is] concerned with a shift of mind from seeing parts to seeing wholes, from seeing people as helpless reactors to seeing them as active participants in shaping their reality, from reacting to the present to creating the future. (Senge, p. 69)

By not utilizing federalism as a public policy approach, NCLB lost an opportunity to forge systems thinking and adaptive work into the efforts to develop solutions for the problem of children getting left behind in America. Instead, NCLB currently represents a short-sighted and ill-conceived attempt to apply a technical fix to a larger systemic problem, the well-being of children in America. Although not noted by the Congress and presidential administration responsible for NCLB, a blueprint already existed that weaved together the constitutional and public policy threads of federalism for the purpose of addressing severe problems and for securing the general welfare of American society. Two Supreme Court justices described the blueprint of federalism whereby states served as laboratories of experimentation for the purpose of trying to find solutions to complex problems. The first was Justice Brandeis in 1932:

There must be power in the states and the nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs. ...To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. (*New State Ice v. Liebmann*, 285 U.S. 262, 311)

The second was Justice O'Connor in 1982:

Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth. When Wyoming became a State in 1890, it was the only State permitting women to vote. That novel idea did not bear national fruit for another 30 years. Wisconsin pioneered unemployment insurance, while Massachusetts initiated minimum wage laws for women and minors. After decades of academic debate, state experimentation finally provided an opportunity to observe no-fault automobile insurance in operation. Even in the field of environmental protection, an area subject to heavy federal regulation, the States have supplemented national standards with innovative and far-reaching statutes. (*FERC v. Mississippi*, 456 U.S. 742, 788-789)

And such was the approach ignored by NCLB in creating a worthy goal, but in failing to utilize federalism as a public policy approach for efforts attempting to find solutions to the problem whereby children are being left behind. The public policy approach of federalism would be enhanced if yoked to systems thinking and adaptive work, as has been shown. But that hasn't yet been done. As a result American public education is left holding the bag for a society that fails to address the larger systemic issues of children's well-being, the system exerting the greatest impact on student learning in school. National efforts to change the view that student achievement gaps are largely a structural failure of the nation remain absent. Without a public policy of federalism linking systems thinking and adaptive work, we continue on a course that continues to camouflage the systemic issues of children's well-being in America. In the words of one analyst, "The most prosperous nation on earth is failing many children" (Jaeger, p. 126).

#### *Conclusion.*

A public policy approach based upon federalism represents the best opportunity to create a learning community focused upon a systems approach to children's well-being that will engage in the adaptive work needed for successful implementation.

#### ***Finding no. 6.***



America is one of the least effective countries of the world's largest industrialized nations in confronting the issue of poverty.

*Discussion.*

Comparative analyses, all of which were presented in Chapter Four of this study, between American and other countries' efforts to address poverty support this finding. Whether the research refers to child poverty rates, or to single parent poverty rates, or to parental subsidies for parents of children aged birth to three-years-of-age, or to success in lifting families out of poverty, or to young mothers in the work force, or to universal free preschool education for children, or to subsidized childcare, the United States consistently is at the bottom end of the comparative spectrum. Comparative economic data within our own country add to this deplorable illustration. During the period 1989 to 1999, the number of millionaire households increased by 200% while by 1998, "only 40 of 100 poor children received assistance ..., the lowest since the 1970s" (Bounds, p. B1; Mathis, 1999, p. 8A). Data illustrating changes in family income in the United States over the course of a decade revealed that while the lowest income decile showed a -14.8% decline, the highest decile income groups experience a +16.5% increase. Characterizing the differing situations between the richest and poorest segments of American society, an economist observed, "By the close of the 1990s the United States had become more unequal than at any other time since the dawn of the New Deal – indeed, it was the most unequal society in the advanced democratic world" (Boshara, p. 91). To illustrate his point, Boshara presented the following data:

The top 20 percent of households earned 56 percent of the nation's income and commanded an astonishing 83 percent of the nation's wealth. Even more striking, the top one percent earned about 17 percent of national income and owned 38 percent of national wealth.... In contrast, the bottom 40 percent of Americans earned just 10 percent of the nation's income and owned less than one percent of the nation's wealth. (Boshara, pp. 91-92)

Another researcher pointed to the cause of increased child poverty and the increasing inequitable distribution of wealth in the nation:

For one thing, recent shifts in the industrial culture, political climate, and tax laws of our nation have generated a massive upward redistribution of income and wealth – away from poor and middle-class Americans and into the hands of the super rich. (Biddle, p. 11)

More recent data about income inequalities in America suggest the situation has worsened for lower income groups and the families therein. In 2007, figures for the top 1% of the wealthiest income group indicated a disturbing comparison with similar figures for 1928, the year before the Great Depression commenced. According to Robert Reich, former U.S. Secretary of Labor and currently a professor of public policy at the University of California, Berkeley, “surging inequality” in America was responsible for both the Great Depression (viewed as beginning with the stock market crash in 1929) and the Great Recession of 2008:

[I]n 1928 the richest 1 percent of Americans received 23.9 percent of the nation’s total income. After that, the share going to the richest 1 percent steadily declined. New Deal reforms, followed by World War II, the GI Bill and the Great Society expanded the circle of prosperity. By the late 1970s the top 1 percent raked in only 8 to 9 percent of America’s total annual income. But after that, inequality began to widen again, and income reconcentrated at the top. By 2007 the richest 1 percent were back to where they were in 1928 – with 23.5 percent of the total. (Reich, p. 13)

Jeff Madrick, senior fellow at the Roosevelt Institute and the Schwartz Center for Economic Policy Analysis, confirmed Reich’s figures for the top 1% and related that to a decreased share to total income for the bottom. Madrick articulated his economic analysis:

[T]he top 1 percent of families made 23.5% of all income in 2007, including capital gains, compared with less than 10 percent in the early 1970s. It hadn’t risen nearly to that level since 1928.... In sum, the top fifth of families increased their share of total income from 41.1 percent in 1973 to 47.3 percent in 2007. The bottom 80 percent lost share. (Madrick, p. 21)

Dean Baker, co-director of the Center for Economic and Policy Research, stated that “rising inequality is at the center of the current economic crisis [of 2008+]” (Baker, p. 17). He attributed the cause to government policy. According to Baker:

The first Great Depression was not just the result of mistaken policy during the initial banking crisis; it was caused by ten years of inadequate policy response... And since that increase in inequality [the Great Recession of 2008+] was not a natural process but the result of conscious policy, it can be reversed.... [U]nions have long been a major force in reducing inequality. Whatever can be done to protect the right to organize and allow workers the option of joining unions will help to reduce inequality. It is not difficult to develop policies to reduce the inequality that has given us a crisis-prone economy. The problem is getting the political will. (Baker, p. 16; p. 17)

Currently, then, we’re seeing an increase in poverty as a result of public policy without a public policy designed to systemically address the increasing poverty, a course that puts increasing numbers of American families and children at risk and insures that increasing numbers of children will get left behind in spite of the public school systems efforts to educate them.

In comparing the American performance against other industrialized nations that provide structural supports for families in poverty, Dr. Angela Taylor concluded, “Perhaps it’s not that the French, Germans, and Japanese expect more *from* their nations’ children but rather that they expect more *for* them” (Emphasis in original) (Taylor, p. 12). Dr. Taylor’s conclusion corroborated the findings of other research studies. For example, after examining data comparing a number of the world’s major economic powers, a researcher at the University of Michigan concluded, “Of all industrialized nations, the United States and South Africa accept the *least* public responsibility for young children” (Emphasis in original) (Lubeck, p. 471).

Explaining the situation, Dr. Lubeck observed:

Despite the fact that government plays an increasingly prominent role in people’s lives, the ideology of private responsibility remains firmly etched in the American consciousness. Child bearing and rearing are perceived to

be a parental/family responsibility, and it is primarily parents who finance child care and early education for their children. (Lubeck, p. 472)

Continuing to explain her findings to the annual meeting of the American Educational Research Association, Dr. Lubeck concluded:

The inability to provide well for children, to afford child care or decent housing or needed health care, has thus signaled *individual rather than structural failure*. Although recent efforts to increase public responsibility for young children in the United States have shown some success, the ideology of individualism and private responsibility continues to hamper the development of a coherent family policy. (Emphasis added) (Lubeck, p. 472)

*Conclusion.*

Much adaptive work will be required in order to re-focus the nation's efforts to more constructively address the problem of poverty.

***Finding no. 7.***

NCLB ignores the adaptive work needed to effectively address the issue of poverty as part of an effort focused on improving the system of children's well-being in America.

*Discussion.*

NCLB ignores the system of children's well-being in America and does not fully address the issue of poverty. Nor is NCLB a part of any such policy effort to address the issue of poverty and the system of children's well-being. As a result, NCLB does not see the need for any adaptive work to be done with regards to either poverty or the system of children's well-being in America. Because it does not see the need for adaptive work to address these problems, NCLB does not engage in the adaptive work required for public and policy support of such initiatives.

NCLB does, however, reflect to some degree adaptive work on the part of private interests at the expense of the public good. According to Doug Christensen, Nebraska's Commissioner of Education in the years when NCLB was enacted and implemented:

[NCLB's intent] is not about improving public education. This is about embarrassing public education, so that we can have a conversation about choice and vouchers and charter schools. Because if it was about improving public education, we wouldn't do it this way. Nobody would. (Janson, 2003, pp. 5-6)

Ted Stilwill, Director of Iowa's Department of Public Instruction during the same time as his counterpart in Nebraska, also observed that some of the legislators' votes in favor of NCLB occurred because the individuals were "not terribly strong advocates of public schools" (Janson, 2003, p. 7). These legislators, according to Stilwill, "viewed public education as monopolistic and as part of the problem, not part of the solution" (Janson, 2003, p. 7). At the very least, the public interest was ignored in favor of private interests on the part of some legislators.

America's declaration of war on poverty occurred some forty years ago. It's first campaign ended in the 1980s with its abandonment. The gap between the vision of no children being left behind in America and the current realities of poverty and lack of public policy support for the system of children's well-being remains large. Public education needs to be addressed as part of a larger, more comprehensively systemic effort aimed at children's well-being that recognizes the nature of the adaptive challenge facing us.

#### *Conclusion.*

Policy makers at the state and national level, graduate schools in education and public policy, think tanks and institutes, along with concerned citizens engaged in working to address issues related to children's well-being in the absence of a systemic public policy approach designed to improve children's well-being, and the news media need to focus primary attention on the multiple facets of children's well-being in America in order to illustrate the gap between American reality and American ideals.

#### *Finding no. 8.*

NCLB does not represent a research-based approach to increasing student achievement.

*Discussion.*

Ironically, while NCLB requires educators to utilize research-based instructional practices, NCLB's basis lacks a research base for improved teaching and learning in American education. First, it ignores the research regarding motivation. Second, it gets assessment wrong. Third, it ignores the research about how children learn.

Extrinsic motivational procedures and external standards, both featured prominently in NCLB, negatively effect learning, at least according to research conducted by Maehr & Stallings (1972), Deci, Spiegel, Ryan, Koestner, & Kaufmann (1982), Grolnick & Ryan (1987), Ames & Archer (1988), Elliott & Dweck (1988), Flink, Boggiano, & Barrett (1990), Utman (1997), Mueller & Dweck (1998), and Amrein & Berliner (2002). This research built on the initial work of Deci and Ryan at the University of Rochester who had postulated a need for autonomy or self-determination as a descriptor of intrinsic motivation. They contrasted intrinsic motivation (individuals focus on learning and mastering task skills) with extrinsic motivation (individuals are pressured by external forces and feel compelled to focus on demonstrating ability and worth).

According to Deci and Ryan, intrinsically motivated persons are willing to try and stretch their abilities beyond their present capabilities. Furthermore, intrinsically motivated individuals derive pleasure from attempting to meet such a challenge. Deci and Ryan believed that intrinsic motivation fostered creativity, spontaneity, and flexibility in problem solving. According to Deci and Ryan, compulsion to achieve by external forces promotes increased feelings of pressure in individuals and fosters low levels of creative, spontaneous, and flexible behavior. Extrinsic motivation also acts to undermine any intrinsic motivation that individuals possess prior to the onset of extrinsic motivation as a prime factor in behavior.

Finally, both directors of state public educational systems in Iowa and Nebraska declared that NCLB missed the boat on motivation through its emphasis on negative reinforcement. As both Stilwill and Christensen noted, shaming and sanctions have a poor track record in their states regarding systemic change (Stilwill, p. 6; Christensen, p. 2). Being grounded in operant conditioning, NCLB's approach also runs counter to B.F. Skinner's research, who noted the ineffectiveness of punishment. According to Skinner, punishment was less effective than positive reinforcement in changing behavior because it:

- caused the individual to “avoid being punished” rather than to focus on changing the behavior;
- caused “slower and less learned responses;”
- trained an individual about “what not to do,” but didn't train them regarding “what to do;” and
- caused a person to “associate the punishment with the punisher” and not the behavior to be abolished or modified (Benson, pp. 80-81)

NCLB also got assessment wrong with its reliance upon summative assessment, or testing, as Doug Christensen, Commissioner of Education in Nebraska, described it. According to Dr. Christensen:

I believe that assessment is a very valuable piece of learning how to teach and teach well and improving teaching, but this (NCLB) is not about assessment – it's about testing. And testing becomes a compliance document. It's the ultimate compliance document. (Christensen, p. 21)

And then, Dr. Christensen's discussion of testing (summative assessment) addressed motivation issues and the lack of a partnership approach by NCLB:

And, you know, if you want people to rise to high levels, you have to make a decision whether or not you're going to be accountable or to be held accountable. And being held accountable makes you a junior partner; it

makes you a lesser person in the hierarchy; it makes you a person who can't be given free choice, free will, as opposed to being accountable.  
(Christensen, p. 21)

With its emphasis on summative assessment (which has no research base for improved student learning), NCLB ignored the research base regarding the use of formative assessment by classroom teachers to improve both teaching and learning. That research base includes the reporting of Fuchs & Fuchs (1986), Atkin & Black (1997), Neill (1997), Stigler & Hiebert (1997), Wineburg (1997), Black & Wiliam (1998), Black, Harrison, Lee, Marshall, & Wiliam (2004), and others.

The mental model of NCLB also serves to direct attention away from the research about how students learn. Grounded in philosophical realism as most of its provisions are (one, education should provide students with “basic and essential knowledge,” most notably in reading, math, and science; two, knowledge exists and can be measured; three, students need to measure up to objective standards; four, the use of tests to evaluate student performance), NCLB runs counter to the research about how children actually learn (Ozmon & Craver, pp. 69, 71-73, 79, 81-82). The extensive research conducted by Vygotsky (1962), Piaget (1954 & 1962), Goodman (1986), Clay & Cazden (1990), and Clay (1991) revealed that knowledge was constructed and developed by learners through their interactions with the world around them. NCLB, on the other hand, views learning as a quantifiable set of facts and abilities that can be taught, learned, mastered, and assessed by a single exam given once a year. For NCLB, a single score obtained at a specific date in time defines learning and determines success or failure, both for each student and her/his own public school. Again, NCLB's stance towards learning is not built on research about how children learn.



Finally, Dr. Christensen identified a possible violation of yet another research base pertaining to the importance of teaching to improved student achievement. While NCLB requires research-based professional development and requires highly qualified teachers as defined by their licensure, NCLB does not value teachers. Such a view would run counter to the research base created by Ferguson (1991), Hedges, Laine, & Greenwald (1994), Greenwald, Hedges, & Laine (1996), and Darling-Hammond (1998). According to Dr. Christensen, the people who actually make a difference in determining whether or not students learn – teachers – are placed by NCLB “clear down at the bottom” (Christensen, p. 2). Dr. Christensen continued by addressing the view towards teachers and administrators, motivation, and the top-down approach which doesn’t value partnering with the states’ public education systems or local educators:

[C]lassroom teachers now are the last people that have anything to say about what happens under No Child Left Behind. In fact, they’re not trusted to have anything to say about it. Superintendents and principals are trusted equally as little, and it’s no respect for the local system of education at all – very little respect for the state system of education and respect only for a particularly slanted view of education at the federal level. (Christensen, p. 2)

In conclusion, NCLB’s approach is not based upon research about motivation, assessment, learning, and possibly teaching. Nor does its emphasis on standards have a demonstrated research base. As two researchers noted, “A focus on standards and accountability that ignores the processes of teaching and learning in classrooms will not provide the direction that teachers need in their quest to improve” (Stigler & Hiebert, pp. 19-20). Also, Atkin & Black’s work in England and Wales offers more evidence regarding the lack of a research base indicating that standards will improve education.

There is no strong evidence from the TIMSS data that the existence or absence of nationally prescribed standards leads to improved [student]

performance.... On this point, the one of us with close experience of the imposition of a national curriculum in England and Wales sees little evidence that this approach has yielded improvement and much evidence that it has damaged the status and morale of those on whom improvement most depends, the teachers. (Atkin & Black, p. 26)

Finally, it should be kept in mind that there may exist other research bases violated by NCLB of which this writer is unaware.

### *Conclusion.*

Revisions of NCLB should focus upon creating an educational growth model for federal financial assistance to education as part of a collaborative state-federal approach that builds upon research-based educational practices and provides for state-level experimentation to best meet the localized needs of its students.

### **Recommendations for Further Research**

Drawn primarily from the findings and conclusions related to the secondary research questions, the following questions are provided in hopes of stimulating interest in further study of issues bearing on the system of children's well-being.

#### **Recommendation no. 1 for future research.**

One of this study's findings centered on the need to address the system of children's well-being in America.

- What would be the component parts of a system of children's well-being in America?
- What are the public policy considerations involved in initially formulating, further developing, and implementing a systemic approach to ensuring the well-being of all children in America?

#### **Recommendation no. 2 for future research.**

Research indicates other major industrialized nations do a much better job of lifting families out of poverty than does the United States.

- What public policies are used to lift families out of poverty?
- What do specific programs look like?
- How do these findings regarding other nation's public policies inform our own policies?
- Which could be implemented as technical fixes, and which would require adaptive work?

**Recommendation no. 3 for future research.**

It has been suggested by several economists that economic inequality in America has played a significant role in impacting current poverty which, in turn, impacts the well-being of children. Economic inequality plays a greater role in the absence of a systemic public policy approach designed to ensure the well-being of all children. These observations prompt the following questions:

- What structural and public policy defects exist in American society that have worked to create a system of economic inequality unequalled in America since the year preceding the Great Depression?
- What are the arguments for and against economic inequality in America?
- What are the values and beliefs undergirding both positions?
- What adaptive work, if any, needs to occur to promote and implement policies designed to promote greater economic equality in America? If adaptive work is ascertained to be required, of what should it consist?

**Recommendation no. 4 for future research.**

At least one researcher has identified an ideology of individualism as a block to viewing socioeconomic inequality as a threat to the well-being of all children in America. Since the well-being of all children in society is not deemed to be a serious societal problem, it does not receive serious, sustained, and widespread discussion. Traditional American mistrust of government has also been mentioned as a block to viewing socioeconomic inequality as a major problem in American society.

- In what adaptive work do policymakers need to engage as they confront the ideology of individualism and suspicion of government acting to block a systemic policy approach designed to ensure the well-being of all children in America?
- Who should assume primary responsibility for engaging in such adaptive work?
- What would the overall campaign of adaptive work look like?

**Recommendation no. 5 for further research.**

Research indicates other countries are more effectively addressing issues of poverty than is the United States. Assuming poverty to be a key component of children's well-being, a study of those nations adjudged to be more effective in addressing poverty could possibly shed light on how other countries view the system of children's well-being.

- How do other industrialized nations address the well-being of children within their own societies?
- What implications do these efforts have for the development and implementation of similar approaches in the United States?
- What beliefs and values held by mainstream Americans would work to:
  - block the implementation of similar policies in this country?
  - assist in the implementation of similar policies in the United States?

The reader may have developed additional questions bases upon the findings and conclusions reached by this study. It is hoped that this study serves to stimulate additional research regarding any of the topics addressed in this investigation of the intersections between a congressional exercise in conditional spending and systems thinking, adaptive work, and constitutional federalism.

### **Concluding Observations**

As matters now stand, NCLB does not link together federalism, systems thinking, and adaptive work in a strategically planned effort to ensure that no child gets left behind in America. Public discussion thus far has centered on compliance with and opposition to the congressional No Child Left Behind Act. According to the analysis of NCLB presented in chapters two through four thus far, America appears to be stuck on a short-sighted and ill-conceived attempt to apply a technical fix to the problem of achievement gaps in public schools without recognizing the larger systemic problem, the well-being of children in America. By ignoring the larger systemic issue America will not recognize the nature of the adaptive work that needs to be done nor will our country harness that recognition to systems thinking and federalism. If we are truly serious about ensuring that no children in America get left behind, we need to unite systems thinking, adaptive work, and federalism, particularly federalism as a public policy approach. One size does not fit all. Nor is everyone agreed upon educational approaches. States as laboratories work well in seeking solutions in the absence of consensus and fit with American pragmatism. Finally, unless the problem of poverty is addressed as part of a systemic approach to the system of children's well-being, constitutional federalism as examined in chapters five through eight of this study becomes irrelevant to the real issue at hand.

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## APPENDICES

## Appendix A

### States and State-imposed Student Achievement Standards, 2002-2003

<u>State Standards To Be Implemented By Individual Districts</u>	<u>State Standards But Districts Can Use Their Own</u>
Alaska	Montana
Arizona	Nevada
Arkansas	New Hampshire
Alabama	New Jersey
California	New Mexico
Colorado	New York
Connecticut	North Carolina
Delaware	North Dakota
Florida	Ohio
Georgia	Oklahoma
Hawaii	Oregon
Idaho	Pennsylvania
Illinois	Rhode Island
Indiana	South Carolina
Kansas	South Dakota
Kentucky	Tennessee
Louisiana	Texas
Maine	Utah
Maryland	Vermont
Massachusetts	Washington
Michigan	Virginia
Minnesota	West Virginia
Mississippi	Wisconsin
Missouri	Wyoming
	Nebraska
	No State Standards; Standards To Be Developed By Each Individual District
	Iowa

Totals Re: No Local Control at the District Level v. Local Control at the District Level

48

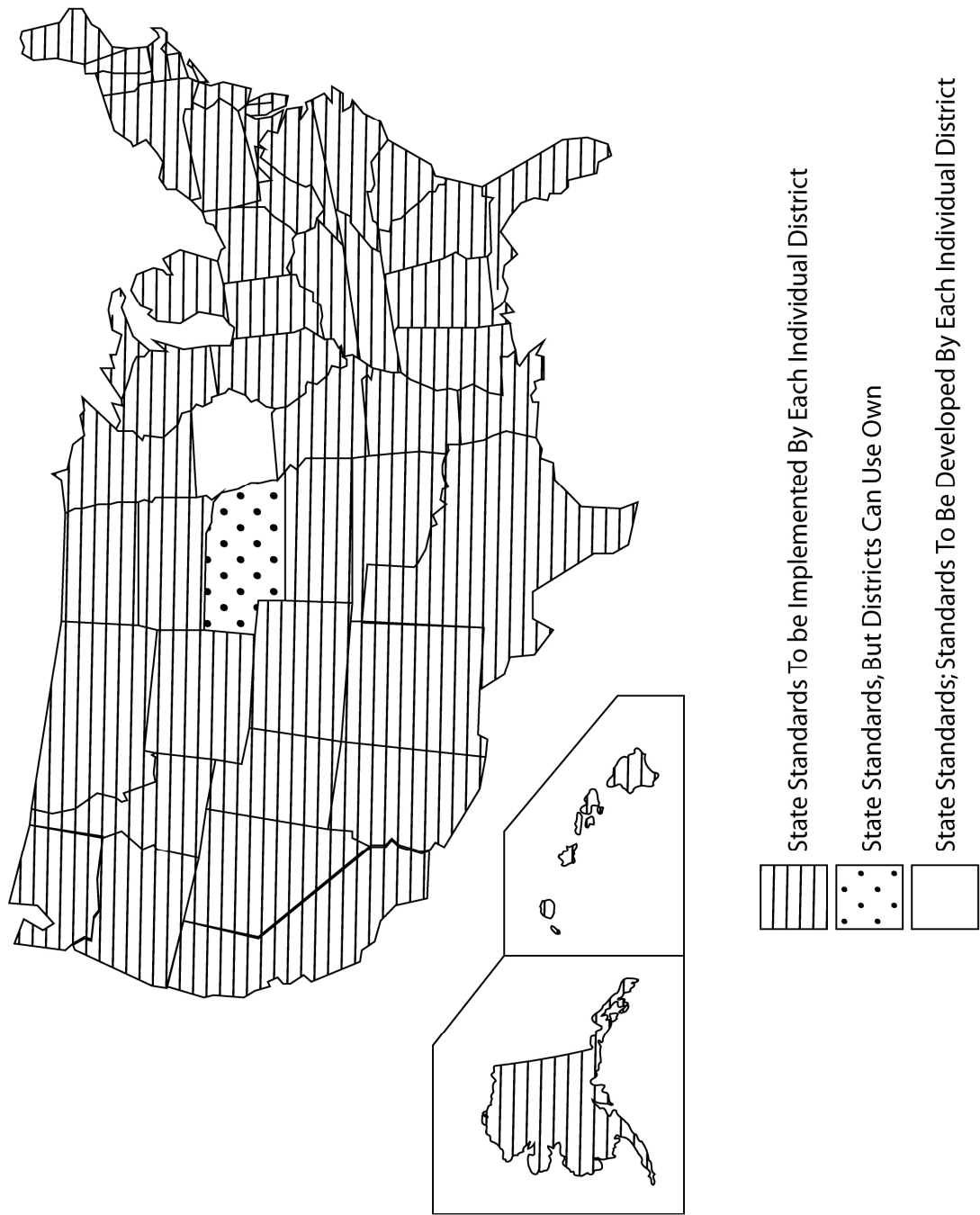
2

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## Appendix B

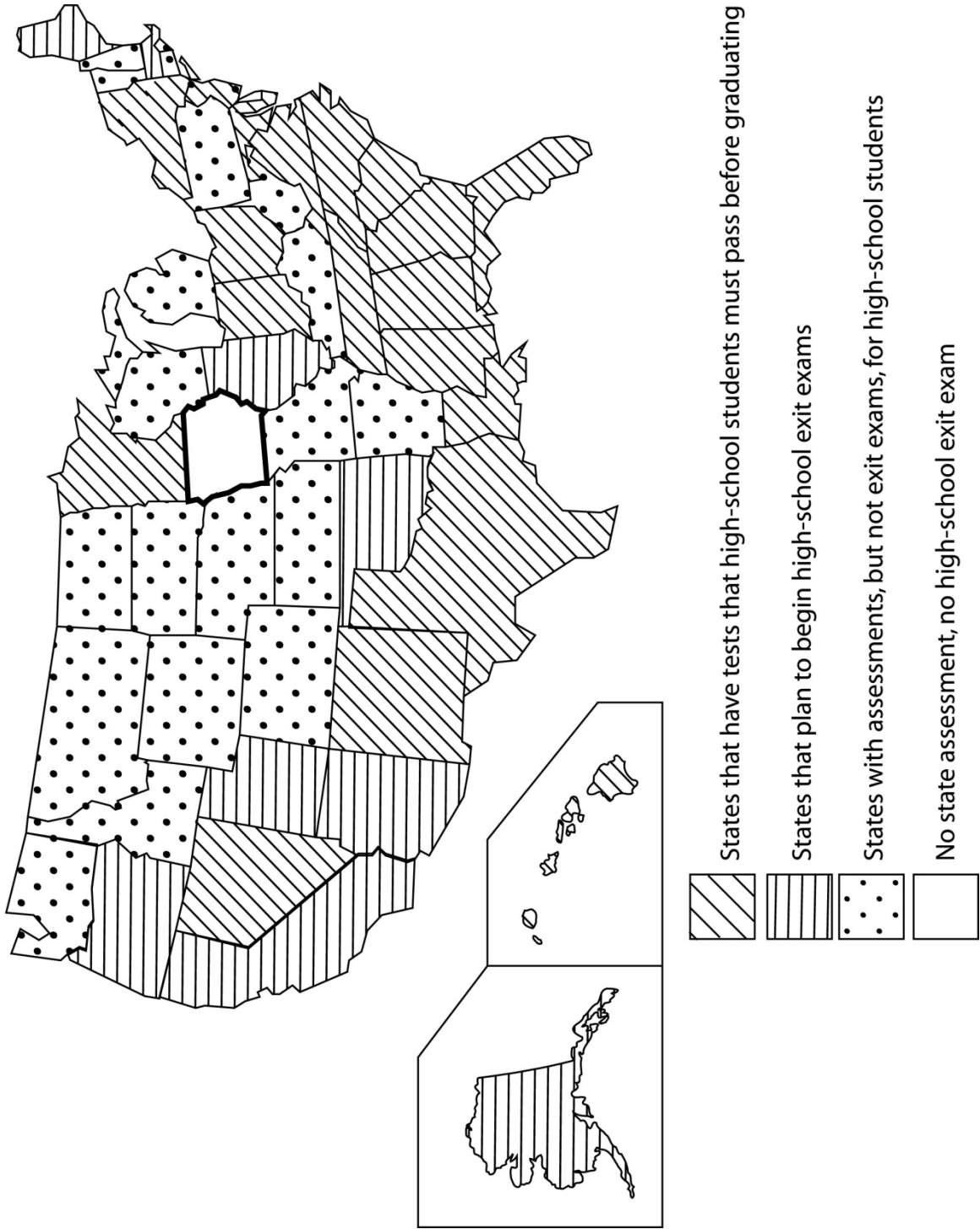
### States and Student Assessments, 1999-2000

<u>Assessments But Not Exit Exams</u>	<u>High School Exit Exams</u>	<u>Planning HS Exit Exams</u>	<u>No State Assessment No HS Exit Exam</u>
Arkansas	Alabama	Alaska	Iowa
Colorado	Florida	Arizona	
Connecticut	Georgia	California	
Delaware	Hawaii	Illinois	
Idaho	Indiana	Maine	
Kansas	Louisiana	Massachusetts	
Kentucky	Maryland	Oklahoma	
Michigan	Minnesota	Oregon	
Missouri	Mississippi	Utah	
Montana	New Mexico		
Nebraska	Nevada		
New Hampshire	New Jersey		
North Dakota	New York		
Pennsylvania	North Carolina		
Rhode Island	Ohio		
South Dakota	South Carolina		
Vermont	Tennessee		
Washington	Texas		
West Virginia	Virginia		
Wisconsin			
Wyoming			
<b>21</b>	<b>19</b>	<b>9</b>	<b>1</b>

#### SOURCE:

Hebel, S. (2001, February 9). Universities push to influence state tests for high-school students. *The Chronicle of Higher Education*, pp. A23-A24.





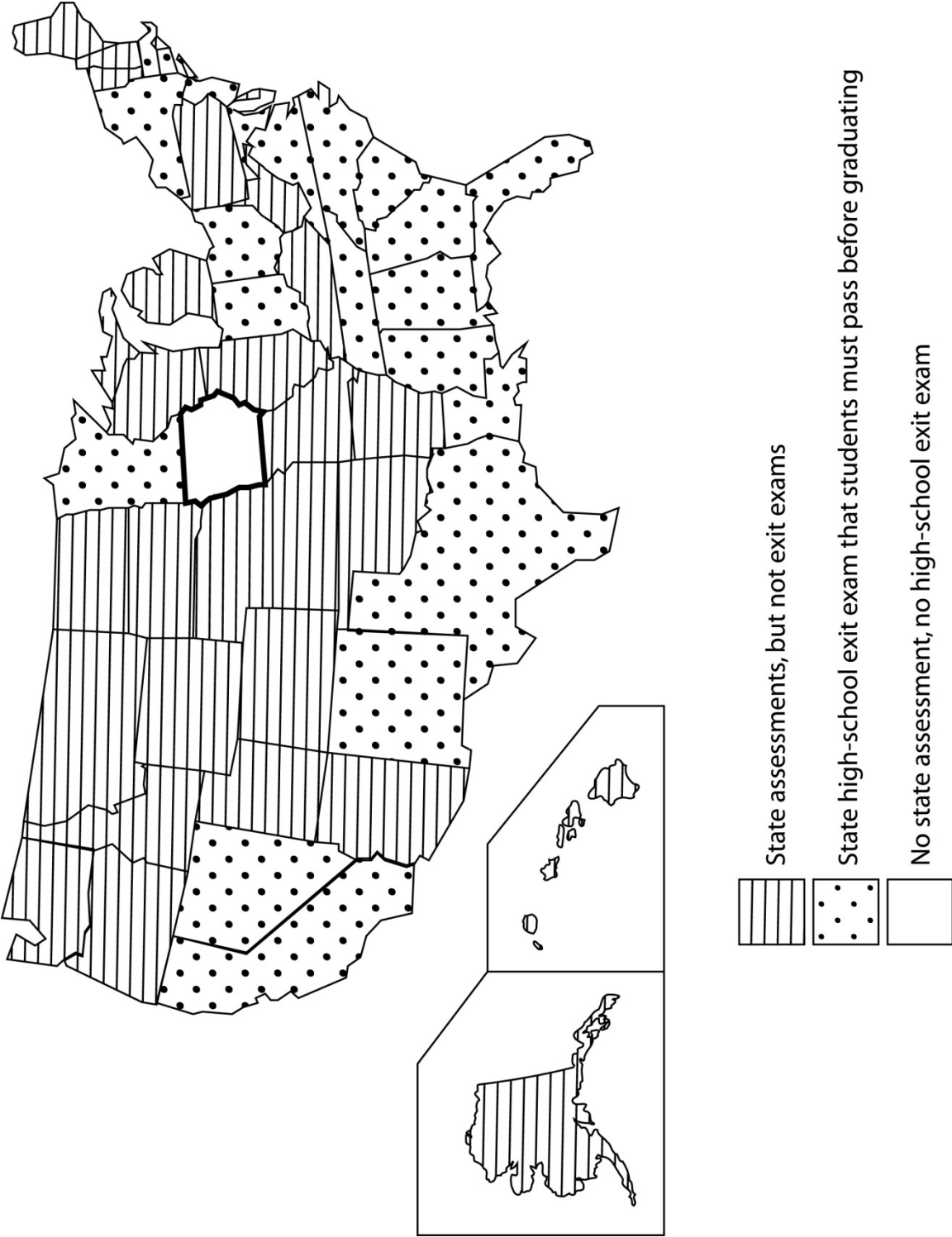
## Appendix C

### States and Student Assessments, 2002-2003

<u>State Assessments But No HS Exit Exams</u>	<u>High School Exit Exams</u>	<u>No State-Required Assessment No HS Exit Exam</u>
Alaska	Alabama	Iowa
Arizona	California	
Arkansas	Connecticut	
Colorado	Florida	
Delaware	Georgia	
Hawaii	Indiana	
Idaho	Louisiana	
Illinois	Maryland	
Kansas	Massachusetts	
Kentucky	Minnesota	
Maine	Mississippi	
Michigan	New Mexico	
Missouri	Nevada	
Montana	New Jersey	
Nebraska	New York	
New Hampshire	North Carolina	
North Dakota	Ohio	
Oklahoma	South Carolina	
Oregon	Tennessee	
Pennsylvania	Texas	
Rhode Island	Virginia	
South Dakota		
Utah		
Vermont		
Washington		
West Virginia		
Wisconsin		
Wyoming		
<b>28</b>	<b>21</b>	<b>1</b>

#### SOURCE:

Council of Chief State School Officers (2003, Fall). *State student assessment programs annual survey: Summary Report: Data on 2001-2002 statewide student assessment programs*. Washington, DC: Council of Chief State School Officers.



## Appendix D

### Organizational Patterns of Selected Law Review Articles

**Merritt, D.J. (1988, January). The guarantee clause and state autonomy: Federalism for a third century. *Columbia Law Review*, 88 (1), 1-78.**

Statement of Problem & organization of article (three paragraphs) – no heading. The third paragraph focused on discussing the organization of the article into the various parts and briefly described what each part would focus upon.

Part I focused on review of strong federal system and Supreme Court's unsuccessful attempts to protect that system. Part II examined the content and history of the Guarantee Clause and demonstrates how it will be a shield for state autonomy. Part III applied this proposal to a variety of federal actions to demonstrate how it would work. Part IV put forth arguments showing how this should be justiciable and thus enforceable in the courts.

- I. BACKGROUND
  - A. The Values of Federalism.
  - B. The Supreme Court and Federalism.
- II. AN ALTERNATIVE FEDERALISM PRINCIPLE: THE GUARANTEE CLAUSE.
  - A. Text of the Guarantee Clause.
  - B. History of the Guarantee Clause.
- III. APPLICATIONS OF THE GUARANTEE CLAUSE.
  - A. The Franchise.
  - B. The Structure and Mechanics of State Government.
  - C. Qualifications for State Office.
  - D. Wages of State Employees.
  - E. Regulation of Private Activity.
  - F. Employing the States as Agents of the Nation.
- IV. JUSTICIABILITY.
- V. CONCLUSION

**Amar, A.R. (1987, June). Of sovereignty and federalism. *The Yale Law Journal*, 96 (7), 1425-1520.**

The introduction included the following: Statement of the problem; Statement of what he proposed to do in the article; and Organization of the article into its component parts. This had no heading and was composed of the following portions:

- Statement of Problem [3 paragraphs].
- Statement of Purpose [1 paragraph].
- Section I Focus [2 paragraphs].
- Section II Focus [1 paragraph].
- Section III Focus [1 one-page paragraph]
- Summarization of problem and solution.

Section I focused on Federalist ideas of sovereignty and dual-agency governance structures.

Section II focused on addressed the problem of sovereign immunity and constitutional violations. Section III focused on how his solution addressed the problem addressed in the introduction.

## I. THE SOVEREIGNTY OF THE PEOPLE.

### A. The Revolutionary Debate.

1. British Ideas.
2. The American Response.
  - a. The Corporate Analogy.
  - b. The State Constitution Experience.

### B. The Federalist Constitution.

1. Creating Central Authority.
2. Limiting State Governments.
3. Dividing Power Horizontally: Bicameralism and Separation of Powers.
4. Dividing Power Vertically: Federalism.
  - a. Federalism and the Empire.
  - b. Federalism and the Confederation.
  - c. Federalism and the Constitution.

### C. The Civil War Debate.

1. The Unitary People.
2. Confederate Vestiges, Union Responses.
3. The Role of the States.

## II. SOVERIGN IMMUNITY AND THE FEDERALIST CONSTITUTION.

### A. Chisholm v. Georgia.

### B. The Eleventh Amendment.

1. The Inadequacy of Current Doctrine.
2. The Advantages of Neo-Federalism.

### C. The Remedial Imperative of Government Liability.

### III. A NEO-FEDERALIST VIEW OF FEDERALISM.

- A. The Riddle of The Federalist.
- B. Military Checks and Balances.
- C. Political Checks and Balances.
- D. Legal Checks and Balances.
  - 1. Historical Examples.
    - a. Fourth Amendment.
    - b. Habeas Corpus.
    - c. State Legislative Power and Federal Judicial Supremacy: A Neo-Federalist Synthesis.
  - 2. A Neo-Federalist Future: Converse – 1983.
  - 3. The Remedial Dialogue.

### IV. CONCLUSION.

**Kaden, L.B. (1979). Politics, money and state sovereignty: The judicial role. *Columbia Law Review* 79, 847 – 897.**

The introduction had no heading, consisted of five paragraphs, and had the following components:

- historical development and context of the problem (4 paragraphs).
- statement of the problem (.75 paragraph).
- outline of the article (.25 paragraph).

### I. STATE SOVEREIGNTY – ITS NATURE AND IMPORTANCE.

- A. The Constitutional Concept of Sovereignty.
- B. The Importance of State Sovereignty.
  - 1. Improved Governmental Processes.
  - 2. Individual Liberty.

### II. THE DECLINE OF STATES' INFLUENCE UPON THE FEDERAL GOVERNMENT.

- A. The Historical Background.
  - 1. The Structural Elements.
  - 2. Political Forces.
  - 3. The Scope of Federal Government Activity.

- B. The Contemporary Scene.
  - 1. The Structural Elements.
  - 2. The Political Forces.
  - 3. The Expansion of the Federal Government.
  - 4. Summary.

### III. FEDERAL INTRUSIONS UPON STATE INTERESTS – SOME EXAMPLES.

- A. Direct Commands to the States.
- B. Federal Grants.
  - 1. The Development of Grant Programs.
  - 2. The Present System.
  - 3. Grants With Strings Attached.
  - 4. Evaluating the Conditions.

### IV. JUDICIAL PROTECTION OF STATE SOVEREIGNTY.

- A. The Traditional Judicial Response.
- B. The Supreme Court's Renewed Interest in State Sovereignty.
- C. Standards for Judicial Review.
  - 1. Direct Commands to the States.
  - 2. Conditions Attached to Federal Grants.

### IV. CONCLUSION.

**Powell, H.J. (1993, April). The oldest question of constitutional law. *Virginia Law Review*, 79 (3), 633–689.**

The introduction had a heading and consisted of six paragraphs (approximately three pages, including citations). The first five paragraphs discussed the historical context of differing interpretations of federalism. The final paragraph stated the problem and the author's focus – a discussion of Justice O'Connor's majority opinion in *New York v. United States* [New York v. United States, 505 U.S. 144 (1992)] in the context of a "historical search for a principled law of federalism" (op. cit. 635). The concluding paragraph of the introductory section also described the particular focus of each section as described below:

- Part I: a summarization of Justice O'Connor's opinion in *New York*.
- Part II: a discussion of O'Connor's development of a theory of federalism and its culmination in the *New York* decision.
- Part III: author's consideration of O'Connor's claim that her concept of federalism has a historical basis.
- Part IV: the author's argument that, although *New York* lacks a firm basis in the federalist debates of the 18th century constitutional period, O'Connor's federalist position can be defended on other grounds.

The outline of Powell's article, shown below, illustrates how he shaped his arguments.

INTRODUCTION.

- I. THE *NEW YORK* DECISION.
  - II. O'CONNOR'S FEDERALISM.
  - III. HISTORICAL ANSWERS TO THE OLDEST QUESTION
    - A. The New Constitution and the Question of Federalism.
    - B. The Historical Search for a Law of Federalism.
      - 1. The Nationalistic Rejection of a Law of Federalism.
      - 2. The Textual Enumeration of Federal Powers.
      - 3. States' Immunities as Constitutional Rights.
      - 4. Historical Precedent for the Autonomy of Process Principle.
  - IV. A PRUDENTIAL JUSTIFICATION FOR *NEW YORK V. UNITED STATES*.
- CONCLUSION.



## Appendix E

### Organizational Patterns of Selected Dissertations Focusing On Legal Analysis And/Or Constitutional Issues

**Dayton, J. (1991). *Constitutional analysis of school funding systems*. Unpublished doctoral dissertation, Indiana University, Bloomington.**

#### I. INTRODUCTION.

Problem Statement.	[2.50 pages]
Research Question.	[0.50 pages]
Procedures.	[1.50 pages]
Limitations of the Study.	[0.25 pages]

#### II. A CHRONOLOGY OF SIGNIFICANT CASE LAW INFLUENCING SCHOOL FUNDING LITIGATION 1971-91.

Introduction.  
 Serrano v. Priest.  
 San Antonio v. Rodriguez.  
 [32 additional cases]  
 Case Law Chronology Summary

#### III. AN ANALYTICAL FRAMEWORK OF SCHOOL FUNDING LITIGATION.

Introduction.  
 Jurisdictional Issues.  
     Justiciability.  
     Standing.  
     Mootness.  
     Ripeness.  
     Political Question.  
     Separation of Powers.  
     Jurisdictional Issues Summary.  
 Judicial Review of Factual Issues  
     Linking Expenditures to Educational Quality.  
     Disparities in Assessed Valuation.  
     Disparities in Per Pupil Expenditures.  
     Evidence of Harm to Children.  
     Factual Issues Summary.  
 Judicial Review of Legal Issues  
     Equal Protection Challenges.  
         Whether Education Is a Fundamental Right.  
         Suspect Class.  
         Level of Scrutiny.  
         State Justification.  
     Education Article Challenges

Constitutional Interpretation.  
 Identifying the State Duty.  
 Determining Whether the Constitutional Duty Is Met.  
 Legal Issues Summary

Judicial Policy Statements

Judicial Competence.  
 Judicial Deference.  
 Precedential Implications.  
 Political Solution v. Judicial Solution.  
 Impact of the State's Fiscal Situation.

Analytical Framework Summary

Applying the Analytical Framework to a Pending Case (Lake Central v. State of Indiana).

IV. FINDINGS, CONCLUSIONS AND COMMENTS.

Findings.  
 Conclusions.  
 Comments.  
 Glossary of Legal Terms.

**Lyman, W.G. (1995). *An investigation into the constitutionality of federal assistance for mass transportation*. Unpublished doctoral dissertation, University of Massachusetts Amherst, Amherst.**

I. INTRODUCTION.

A. Problem Statement/Purpose/Questions.	[2.25 pages]
B. Scope.	[1.50 pages]
C. Organization	[1.25 pages]

II. A HISTORY OF FEDERAL INVOLVEMENT IN TRANSPORTATION.

A. Introduction.  
 B. Federal Policy.  
 C. Water Transportation.  
 D. Railroads.  
 E. Air Transportation.  
 F. Roads.

III. A HISTORY OF MASS TRANSPORTATION.

A. Up to 1958.  
 B. Since 1958.  
 C. Results of Federal Aid.  
 D. Conclusion.

IV. HISTORICAL PERSPECTIVES ON THE INTERSTATE COMMERCE AND GENERAL WELFARE CLAUSES.

A. Introduction.  
 B. Presidents.

- C. Jurists.
- D. Alexander Hamilton.
- E. Conclusion.
- V. CASE HISTORIES OF THE INTERSTATE COMMERCE CLAUSE AND THE GENERAL WELFARE CLAUSE.
  - A. Introduction.
  - B. Interstate Commerce Clause.
  - C. General Welfare Clause.
  - D. Conclusion.
- VI. ANALYSIS / CONCLUSIONS.
  - A. Introduction.
  - B. Interstate Commerce Clause.
    - 1. The Negative Doctrines.
    - 2. The Positive Doctrines.
  - C. General Welfare Clause.
  - D. Conclusions.

**Colwell, W.B. (1996). *The constitutionality of the Illinois Waiver of Educational Mandates Act: Legislative use of the joint resolution*. Unpublished doctoral dissertation, University of Illinois, Urbana-Champaign.**

- I. INTRODUCTION.
  - Federal and State Deregulation of Education.
  - Governmental Response: State of Illinois.
  - Statement of the Problem.
  - Purpose and Significance of the Study.
  - Research Question.
  - Organization of Study.
  - Limitations of the Study.
  - Summary.
- II. REVIEW OF LEGISLATION.
  - Historical Analysis of Deregulation of Educational Mandates in Illinois
  - Summary
- III. LEGAL ANALYSIS: THE LEGISLATIVE VETO.
  - Legislative Veto: An Introduction
  - The Administrative Procedures Act
  - Case Law
  - Summary
- IV. LEGAL ANALYSIS: OTHER CONSTITUTIONAL ISSUES.
  - Separation of Powers
  - Legislative Denial: Use of Statute or Resolution

Special Legislation  
 Equal Protection  
 Summary

V. RESULTS AND DISCUSSION.

Constitutional or Unconstitutional? Application of Legal Principles to Public Law 89-3  
 Comparison of Public Law 89-3's Legislative Provisions: Waiver versus Modification  
 Separation of Powers  
 Legislative Act? Joint Resolution 60  
 Equal Protection and Special Legislation  
 Legislative Veto  
 Summary

VI. CONCLUSIONS, AMENDMENTS, AND RECOMMENDATIONS FOR FURTHER STUDY.

Conclusions  
 Severability  
 Amendments  
 Policy Implications of Public Act 89-3  
 Recommendations for Further Study

**Skuly, R.J. (1998). *The constitutionality of the noncurricular religious use of Ohio schools*.  
 Unpublished doctoral dissertation, Kent State University,**

1. INTRODUCTION AND OVERVIEW OF THE STUDY.

Problem  
 Purpose of the Study  
 Delimitations  
 Definitions  
 Procedure  
 Organization

2. REVIEW OF THE HISTORY OF THE FIRST AMENDMENT, FEDERAL LAW DEALING WITH THE NONCURRICULAR RELIGIOUS USE OF SCHOOLS, AND THE OHIO CONSTITUTION.

The First Amendment  
 Creation of a Bill of Rights  
 A Wall of Separation  
 Application of the First Amendment to the States  
 Establishment and Free Exercise  
 Establishment and Free Speech – the Equal Access Act  
 Religious Freedom Restoration Act  
 The Ohio Constitution and Law Dealing with the Noncurricular Religious Use of Schools  
 State Laws and the Religious Use of Schools  
 Summary

3. ANALYSIS OF CASES DEALING WITH THE NONCURRICULAR RELIGIOUS USE

## OF SCHOOLS.

Cases in Which Churches Have Requested the Use of School Facilities for Religious Services

Cases in Which Community Groups Have Requested the Use of School Facilities to Hold Programs or Activities with Religious Content

Cases in Which Community Groups Have Requested the Use of School Facilities to Hold School Baccalaureate Programs

Cases in Which Student Groups Have Requested the Use of School Facilities for Religious Meetings or Club Activities.

Cases in Which Citizens Brought Suit Because of Approved Noncurricular Use, or Bans on Use, of School Facilities.

Cases Involving the Use of Public Facilities Other than Schools for Religious Purposes

Cases Involving the Use of Schools for Speech Which Might be Considered Controversial  
Summary

## 4. DISCUSSION AND CONCLUSIONS.

Common Grounds for Challenges to the Noncurricular Religious Use of Schools

Establishment Clause Violations

Free Exercise Clause Violations

Free Speech Clause Violations

Policy Considerations for Regulating Facilities Use by the Public

Policy Considerations for Regulating Facilities Use by Students

Conclusions

## Appendix F

### Interview Questions:

**Doug Christensen, Commissioner of Public Education for Nebraska;  
Ted Stilwill, Director of the Iowa Department of Education**

1. So, from where you sit today, is No Child Left Behind a good law?
  
2. What have been your conversations with federal legislators re: NCLB?
  - Why did they vote for it?
  - Do they intend to drastically revise it?
  
3. What is the impact of NCLB upon federalism?
 

" " " " " " " " your job?
  
4. In what ways does this law either align or conflict with your beliefs and values?
  
5. Have you had conversations with either the governor or the attorney general about a possible lawsuit?
  
6. Some believe NCLB is an attempt to undermine public education by setting impossibly high standards, thus opening the way for vouchers. In your opinion, is NCLB ethical re: public education?
  
7. Why do you suppose there has not yet been a lawsuit challenging the constitutionality of NCLB?
  
8. If not challenged or changed, how do you see this playing out? What will education look like in 10-20 years?
  
9. What metaphor or analogy best describes No Child Left Behind?

## Appendix G

### Time Spent In School As a Percent of a Young Person's Life From Birth Until High School Graduation and Selected Portions of the Iowa Administrative Code, School Rules of Iowa

#### Percent of Time Receiving Instruction

This figure is based on Iowa requirements and the following calculations. Total hours from birth until age five:  $365 \text{ days} \times 24 \text{ hours} \times 5 \text{ years} = 43,800 \text{ hours}$ . Total hours beginning with kindergarten through the senior year of high school, from age five until age eighteen:  $365 \text{ days} \times 24 \text{ hours} \times 13 \text{ years} = 113,880 \text{ hours}$ . The total hours of life from birth until age 18 = 157,680 hours. Iowa requires a school calendar of 180 days of instruction and an instructional schedule of 5.5 hours per day in class:  $180 \text{ days} \times 5.5 \text{ hours} \times 13 \text{ years} = 12,870 \text{ hours}$ . Percent of time receiving minimal instruction of a young person's life from birth until high school graduation equals 12,870 hours divided by 157,680 total hours which equals 8.16 percent ( $12,870 / 157,680 = .081621 = 8.16\%$ ). Such a figure represents perfect attendance as well as perfect weather with no weather cancellations, no days lost for parent-teacher conferences, no days lost for family emergencies, no partial days lost for participation in co-and extra-curricular activities, and no days lost for state tournament participation. The figure has been rounded to 8.2% for clarity and ease of discussion.

Of course, if instructional time represents 8.2% of a young person's life, non-instructional time equals 91.8% of a young person's life from birth until high school graduation.

#### Percent of Time Receiving Instruction in Core Academic Areas

The core academic areas include English/language arts, mathematics, science, and social studies. Generally, from grades 7-12, students will generally average 45 minutes per day in each of the core areas whether they follow an eight-period day or an A-B block schedule. Assuming a

best-case scenario of a student taking a core curriculum each year from seventh through twelfth grade, total time spent in core classes per day equals  $.75 \text{ hrs.} \times 4 = 3 \text{ hours per day}$ . Although the core areas vary from kindergarten through sixth grade (English/LA & math dominating the early grades with science and social studies receiving greater emphasis in the upper elementary grades), let's assume an average of 45 minutes per day for instructional time in each of the core areas. Let's also assume full-day, every day kindergarten as well. Thus total time spent in core classes per day from kindergarten through sixth grade equals 3 hours per day as well. Total core academic instruction time from kindergarten through twelfth grade would equal  $3 \text{ hrs/day} \times 180 \text{ days/school year} \times 13 \text{ years} = 7,020 \text{ total hours of core academic instruction}$ . Percent of time receiving core academic instruction of a young person's life from birth until high school graduation equals  $7,020 \text{ hours divided by } 157,680 \text{ total hours which equals } 4.45 \text{ percent } (7,020 / 157,680 = .04452 = 4.45\%)$ .

Of course, NCLB emphasizes English/language arts, mathematics, and science while ignoring social studies. This would make the 4.45% (percent of a young person's life receiving core academic instruction) even lower, but for argument's sake, let's assume that 4.45% is a roughly accurate figure. Perhaps it can be assumed that homework makes up the difference. NCLB thus emphasizes 4.45% of a young person's life as the major system while ignoring the 95+% of an individual's life spent outside of the core academic areas.

#### Chapter 12, Iowa Administrative Code, School Rules of Iowa

**§ 281 – 12.1(7) *Minimum school calendar* ...** Each board shall adopt a school calendar that identifies specific days for student instruction, staff development and in-service time, and time for parent-teacher conferences. The length of the school calendar does not dictate the length of contract or days of employment for instructional and noninstructional staff.



The school calendar may be operated anytime during the school year of July 1 to June 30 as defined by Iowa Code section 279.10. A minimum of 180 days of the school calendar... shall be used for student instruction... (Exception: A school or school district may, by board policy, excuse graduating seniors up to five days of instruction after school or school district requirements for graduation have been met.)

**§ 281 – 12.1(8) *Day of school.*** A day of school is a day during which the school or school district is in session and students are under the guidance and instruction of the instructional professional staff. School shall be considered in session during parent-teacher conferences as well as during activities such as field trips if students are engaged in programs or activities under the guidance and direction of instructional professional staff.

**§ 281 – 12.1(9) *Minimum school day.*** A school day shall consist of a minimum of 5 1/2 hours of instructional time for all grades 1 through 12. The minimum hours shall be exclusive of the lunch period. Passing time between classes as well as time spent on parent-teacher conferences may be counted as part of the 5 1/2-hour requirement.

**§ 281 – 12.5(3) *Elementary program, grades 1 – 6.*** The following areas shall be taught in grades one through six: English-language arts, social studies, mathematics, science, health, human growth and development, physical education, traffic safety, music, and visual art.

**§ 281 – 12.5(4) *Junior high program, grades 7 and 8.*** The following shall be taught in grades 7 and 8: English-language arts, social studies, mathematics, science, health, human growth and development, physical education, music, visual art, family and consumer education, career education, and technology education. Instruction in the following areas shall

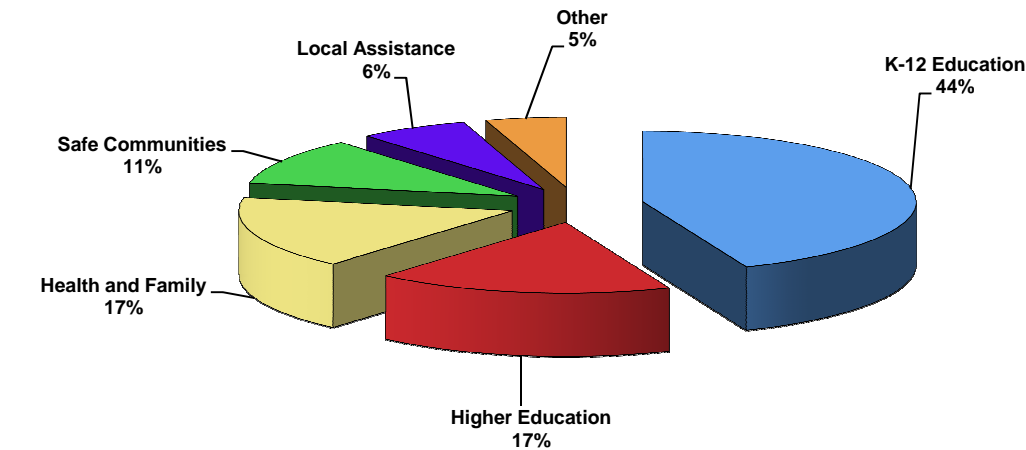
include the contributions and perspectives of persons with disabilities, both men and women, and persons from diverse racial and ethnic groups, and shall be designed to eliminate career and employment stereotypes.

**§ 281 – 12.5(5) *High school program, grades 9 – 12.*** In grades 9 through 12 a unit is a course or equivalent related components or partial units taught throughout the academic year as defined in subrule 12.5(18). The following shall be offered and taught as the minimum program: English-language arts, six units; social studies, five units; mathematics, six units as specified in 12.5(5)“c”; science, five units; health, one unit; physical education, one unit; fine arts, three units; foreign language, four units; and vocation education, 12 units as specified in 12.5(5)“i.”

Appendix H

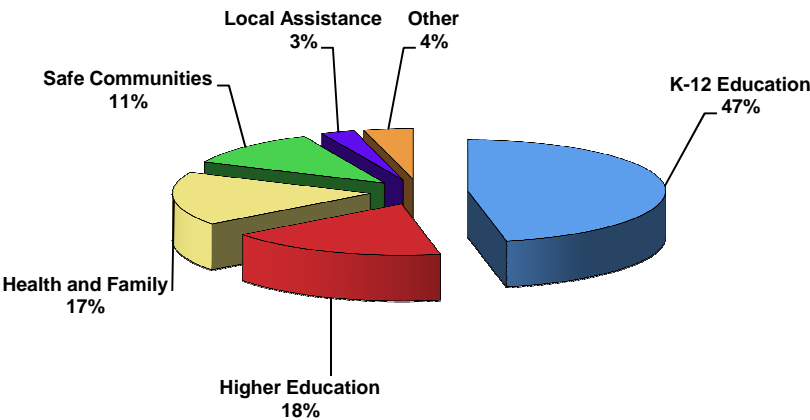
State General Budgets of Iowa for FY'04 & FY'05  
Indicating Percent of Funds Allocated for Educational Purposes

FY 04 Enacted General Fund Budget



Source: Department of

FY 05 Enacted General Fund Appropriations



## Appendix I

### Educational Attainment of Metropolitan Areas For the Age Population 25 Years and Over As Measured By Possession of a Bachelor's Degree or Better According to the United States Census 2000 Summary File

<u>Rank</u>	<u>Metropolitan Area</u>	<u>Percent of Population w/BA+</u>
1.	Iowa City, IA	47.6 %
2.	Corvallis, OR	47.4%
3.	Lawrence, KS	42.7 %
4.	Columbia, MO	41.7 %
5.	Madison, WI	40.6 %
6.	Charlottesville, VA	40.1 %
7.	Santa Fe, NM	39.9 %
8.	Bloomington, IN	39.6 %
9.	Fort Collins-Loveland, CO	39.5 %
10.	Raleigh-Durham-Chapel Hill, NC	38.9 %
11.	Gainesville, FL	38.7 %
12.	Champaign-Urbana, IL	38.0 %
13.	San Francisco-Oakland-San Jose, CA	37.3 %
14.	Burlington, VT	37.2 %
15.	Washington DC-Baltimore-Alexandria	37.1 %
16.	College Station, TX	37.0 %
17.	Tallahassee, FL	36.7 %
17.	Austin, TX	36.7 %
19.	State College, TX	36.3 %
20.	Bloomington-Normal, IL	36.2 %
21.	Boulder, Denver, Greeley, CO	35.5 %
22.	Rochester, MN	34.7 %
23.	Boston-Worcester-Lawrence, MA	34.4 %
24.	Athens, GA	34.1 %
25.	Portland, ME	33.6 %

**Data Set Obtained from:**  
**Beth Henning, Census Specialist, Reference Desk,**  
**State Library of Iowa;**  
**who dynamically generated the table from the 2000 Census data**  
**provided by the U.S. Census Bureau.**

## Appendix J

### Interpretations of Madison's Raising Constitutional Objections In His Opposition to the Bank Bill

The initial incident (Madison's threat to raise constitutional objections if a shorter term for the bank to be located in Philadelphia was not agreed to), as viewed by historians, is somewhat controversial. Representative William L. Smith reported it in his publication, *The Politicks and Views of a Certain Party Displayed* (1792), p. 17. Madison denied it in "Notes on William Loughton Smith's *Politicks and Views*," (4 November 1792), *PJM*, 14, pp. 399-400. Boyd, the editor of Jefferson's papers, opined that the "constitutional issue was raised belatedly" as "primarily a weapon of defense" since there were "grounds for supposing that southern – especially Virginia – opposition to a national bank chartered for twenty years rested on the suspicion that this was another means of keeping the government in Philadelphia" (*PTJ*, 19, p. 281). Several of Madison's contemporaries were of the same opinion. Representative Fisher Ames of Massachusetts stated that the "great point of difficulty was, the effect of the bank law to make the future removal of the government from Philadelphia less likely" and was what motivated both Madison and Jefferson to oppose the bank bill (*PTJ*, 19, p. 281; see also Bowling, p. 235; Elkins & McKittrick, 798, n. 50; McDonald, p. 202). Representative Benjamin Bourne of Rhode Island observed that Madison had opposed the bank "both on the ground of unconstitutionality [sic] and inexpedience. But I am persuaded we would not have heard anything of either, did not the Gentleman from the Southward view the measure, as adverse to the removal of Congress, ten years hence" (McDonald, 1979, pp. 201-202; see also Bowling, p. 235). Even a foreign observer was able to discern a connection between the capital's location and the bank bill. Théophile Cazenove, serving as a representative of multiple Amsterdam firms,

wrote in a letter to the firms the following analysis: “As those who desire that the seat of government be on the Potomac are united against the Bank, so the opposite party are united in its favor” (PTJ, 19, p. 281).

How did Madison’s principal biographers, who were examined for this paper, treat Madison’s opposition to the bank bill? Garry Wills omitted the entire incident from his biography of Madison. Ralph Ketcham omitted any discussion regarding a connection between the bank bill and the capital’s location. Ketcham also ignored the negative congressional reaction to Madison’s raising of constitutional objections to the bank bill as well as any reference to Madison’s politicking with the Pennsylvania delegation. Lance Banning spent most of one page (a long paragraph) presenting Hamilton’s bank proposal and then moved immediately into a three-page presentation of Madison’s objections to the bill as presented in a full-day speech to the House (Banning, pp. 325-328). Banning omitted all reference to the negative response Madison’s constitutional objections encountered in the House. Regarding the connection that Madison’s contemporaries made between opposition to the bank bill and the future removal of the capital to the Potomac, Banning stated, “A minority of modern analysts concur with Ames and other critics in attributing the framer’s stand to southern fears that the creation of the bank would impede the transfer of the government from Philadelphia to the Potomac” (Banning, p. 329). Mentioning Smith’s assertion, Banning dismissed it by noting Madison’s assertion that “this charge was ‘false’” (Banning, p. 329). Banning then immediately launched into a four-page defense of Madison against the “minority of modern analysts” previously mentioned by stating, “Led by his biographers, the friendly critics have advanced a different explanation [for Madison’s position]” (Banning, p. 329). Under this alternative explanation, Hamilton’s economic proposals “favored the Northeast, benefited the financial interests, and created a

corrupted corps of treasury supporters in the Congress” (Banning, p. 329). According to Banning’s interpretation of the incident by Madison’s benevolent critics, “Madison could not abide ... a construction of the Constitution that would free the predators from constitutional constraints” (Banning, p. 329). Four pages later, Banning concluded:

With the signing of the bank bill, he [Madison] decided to arouse a popular resistance to a scheme that he was coming to perceive as a concerted effort to subvert the people’s Constitution and to undermine the liberty that he had meant that Constitution to preserve. (Banning, p. 333)

One wonders what Smith would have to gain by falsifying what happened between Madison and the Pennsylvania delegation. Such wondering would not find a plausible answer. If one asks whether or not the incident was isolated and unsupported by other credible evidence, the question to both would be, “No.” On the contrary, multiple contemporaries drew a connection between Madison’s raising of constitutional objections and the question of the capital’s future location. Furthermore, if one asks what Madison would have to gain by denying what happened, the answer would be the credibility of his constitutional objections. If one asked whether this represented an isolated incident in which Madison raised (by declamation or precipitated through his actions) constitutional issues to achieve political ends, the answer again would be, “No, it happened on multiple occasions.” And one would then list the bank bill, Jay’s Treaty (see Appendix K), the Kentucky & Virginia Resolutions (see section of the same title in the historical background of the Tenth Amendment), and Marbury’s appointment (See n. # 36). If one asked whether Madison engaged in falsifying evidence or in later modification of his writings to improve his public image, the answer would be, “Yes.” According to one of his principal biographers, “Julian Boyd, the editor of Jefferson’s papers, caught him in an egregious falsification” regarding criticism he had made of Lafayette in a letter to Jefferson by which he

“deleted original passages” and “faked Jefferson’s handwriting” (Wills, 2002, p. 162). Professor Wills also described how Madison tried to minimize his own role in the Virginia Resolutions by getting Jefferson to remove Madison’s “defense of them from the curriculum of the University of Virginia” (Wills, 2002, pp. 162-163). According to Wills, Madison had “even wanted *The Federalist* removed too, since John Taylor of Caroline had made that book part of the dispute over secession” (Wills, 2002, p. 163). Finally, when his record of the proceedings of the Constitutional Convention were opened up publicly, Wills states that Madison “tried to place it in a context that would take the edges off the inevitable reversals and contradictions of [his] life...” (Wills, 2002, p. 163).

In the final analysis, I find it too difficult to refute the analysis offered by what Banning referred to as a “minority of modern analysts” (Banning, p. 329). I simply don’t think they went far enough by placing that one incident in the fuller context of other incidents in which Madison appeared to play politics with the Constitution in order to achieve ends he personally wanted. But I would also agree that Madison had political objections to measures he opposed, particularly Hamilton’s economic proposals. I’m not convinced, however, that they were legitimately constitutional issues. In the end, they were not judged to be viable in a constitutional sense. However, historians will continue to debate the issue.



## Appendix K

### A Second Constitutional Issue in Washington's Administration: Jay's Treaty

Two constitutional issues were raised during President Washington's tenure in office; James Madison initiated both. The first involved legislation establishing the First Bank of the United States as discussed previously with the constitutional issue centering on the Tenth Amendment as it intersected with the Necessary and Proper Clause. The second issue included new claims put forth by Madison regarding constitutional treaty-making, a dispute in which Jay's Treaty served as the precipitating agent.

The treaty resulted from a decision in 1794 "to send John Jay to London as a special envoy to negotiate a general settlement of outstanding differences" between the British and American governments, some of which had arisen out of Britain's conflict with France (Elkins & McKittrick, p. 388; for details of the treaty, its negotiation, its reception in the United States, the American context, and its ratification, see Elkins & McKittrick, pp. 388-449). To say that James Madison did not like the treaty would be to misstate his true feelings. One of his principal biographers more aptly described Madison's reaction. "Madison exploded indignantly when ... he learned the terms of the treaty, that the Senate had ratified it, and that the President had ... signed it" (Ketcham, p. 357). Two other historians described Madison's reaction by placing it in the context of his life's work: "Madison, so much of whose effort ever since 1789 had been devoted to protecting the American republic from the corruptions of British commerce, and who could now see his entire projected system being wrecked by the treaty, was irreconcilable" (Elkins & McKittrick, p. 442). Part of Madison's reaction stemmed from a "strain of anglophobia" that ran "as deep as ever" through his belief system (Elkins & McKittrick, p. 269).<sup>122</sup> In Madison's thinking, Great Britain represented the antithesis of republican virtue as it

was “the home of monarchy and aristocracy, of corruption, ... of ‘fashion and superfluity,’ and of manufacturing, which of all occupations produce[d] ‘the most servile dependence of one class ... on another’” (Elkins & McKittrick, p. 269). Reflecting his “agrarian bias,” Madison believed that “self-sufficient farmers” best provided the “social and economic foundations necessary for republican government” (Ketcham, pp. 313 & 328). According to Madison:

The class of citizens who provide at once their own food and their own raiment, may be viewed as the most truly independent and happy. They are more: they are the best basis of public liberty, and the strongest bulwark of public safety. (Elkins & McKittrick, p. 269)

Furthermore, according to Madison, yeoman farmers “are exempt from the ‘distresses and vice of overgrown cities’” (Elkins & McKittrick, p. 269). In contrast, manufacturing and industry, located for the most part in cities, produced “the most servile dependence of one class ... on another” (Elkins & McKittrick, p. 269).

As the acknowledged legislative leader of the emerging opposition party to the Federalists, Madison provided the ideological support for a movement in the House of Representatives to defeat the treaty. The cost for Madison, however, was a further abandonment of earlier principles and of a constitutional procedure he had helped develop. Edward Livingston of New York began the assault in the House by introducing a motion that requested President Washington “to furnish papers related to the negotiation of Jay’s Treaty” (Ketcham, p. 361). Madison then asserted “the right of the House both to request executive papers, and by passing or rejecting legislation to carry out the treaty, to pass upon the treaty’s validity” (Ketcham, p. 361). Ironically, Jay’s Treaty had been negotiated and ratified according to the constitutional requirements that Madison himself had helped establish. Furthermore, it was a legal process that Madison had defended when he wrote *Federalist* Numbers 62 and 63 discussing the Senate. As Madison stated, the Senate was the proper body of Congress to be involved with foreign affairs

because of its members' longer tenure of office and staggered terms which gave it the ability to have an institutional memory that made it more capable of a stable policy and thereby help the country be more trustworthy to other nations. "Without a select and stable member of the government, the esteem of foreign powers will ... be forfeited by an unenlightened and variable policy" (Federalist No. 63, p. 350). According to Madison, the House of Representatives was not a suitable body to be involved in foreign affairs because its greater numbers and shorter tenure in office did not allow it to develop a "due sense of national character" (Federalist No. 63, p. 350). Madison had written, "Yet, however requisite a sense of national character may be, it is evident that it can never be sufficiently possessed by a numerous and changeable body" (Federalist No. 63, p. 351).

Now, however, Madison claimed the House had the ability to nullify a treaty after the Senate had ratified it. According to one of his biographers, Madison exceeded his own authority and tried "to tear down what he had built up" (Wills, 2002, p. 40). Madison's position "was more than 'loose construction' of the Constitution. It amounted to reversal of its plain sense" (Wills, 2002, p. 42). Such was also the opinion of a fellow legislator from New York who had opposed the Constitution as an Antifederalist. Speaking to the House,

John Williams said he himself had opposed the treaty-making power of the President and Senate at his state ratifying convention, but had never doubted that the Constitution gave it to them, nor understood that the House of Representatives had been given the power to interfere in treaties. (Elkins & McKittrick, p. 445)

Livingston's resolution passed the House, 62-37, "and on March 25 the call for papers was conveyed to the President" (Elkins & McKittrick, p. 445).

One historian characterized what followed as President Washington "read[ing] Madison a lesson on constitutionalism" (Wills, 2002, p. 42). In a message to the House, Washington

declined to comply with the resolution because the Constitution had given “the power of making Treaties [to] the President with the advice and consent of the Senate” (Elkins & McKittrick, p. 445). Washington reminded the House that he had been a member of the Constitutional Convention and could thus report that the clear understanding of the Convention that when treaties were “ratified by the President, with the advice and consent of the Senate”, and were thus published, “they become obligatory” (Elkins & McKittrick, p. 445). And then, Washington administered the master stroke. As President of the Constitutional Convention, Washington had been entrusted with keeping the official journal of its proceedings. He quoted a citation that “showed that the convention had specifically voted against the idea that ordinary legislation [involving the House] could reach to treaty-making (both Madison and Washington had voted with the majority against that claim)” (Wills, 2002, p. 42).

The House subsequently dropped its demand and appropriated funds to implement Jay’s Treaty. Madison did not attribute the failed attempt to defeat the treaty to any failure within himself. Instead, Madison blamed “[t]he banks, the British merchants, [and] the insurance companies” as well as “the exertions and influence of Aristocracy, Anglicism, & mercantilism” (Ketcham, p. 365; Elkins & McKittrick, p. 446). In addition to the failure of his attempt to raise a constitutional objection that would defeat the treaty, Madison suffered a personal loss as well, the loss of his friendship with George Washington. Washington “washed his hands of his friend after the treaty affair” (Leibiger, p. 209). In his view, Madison had “brought the Constitution to the brink of a precipice” and had endangered the “peace, happiness and prosperity of the Country” for motives that he suspected were “bad” (Leibiger, p. 209). The consequences were described by one of Madison’s biographers:

Washington would never rely on him again, never consult him never invite him to a private meeting in the executive mansion where Madison had been

the trusted confidant, never receive him at Mount Vernon, where he had spent so many days and nights, regularly stopping off on trips to and from his home in Orange County. (Wills, 2002, p. 43)

Washington “had concluded, after a long sad experience, that Madison was duplicitous and dishonorable” (Wills, 2002, p. 43).

## Appendix L

### Discussions of Judicial Review By the Framers During the Constitutional Convention In 1787

For the most part, the Framers did not discuss the issue of judicial review during their consideration of the jurisdiction of the federal courts. Instead they discussed the concept during repeated discussions about an idea originally presented during the early stages of the Convention, a proposal for a council of revision that amounted to an executive veto of legislation. During the conversations about a veto power, various leading men of the Convention repeatedly asserted that “the federal judiciary would declare null and void laws that were inconsistent with the constitution” (Farrand, 1913, p. 157). Thus it was assumed that the power of judicial review existed and was often used as a reason to defeat the idea of a council of revision that would join together the executive and judicial branches of government to examine legislative acts.

The idea of a council of revision was the brainchild of James Madison as the author of the Virginia Plan, a plan described as “the basic framework for the document that became the Constitution of the United States” (Ketcham, p. 188). Prior to the actual beginning of the Convention, the Virginia delegation “agreed that Madison’s plan ... should be presented to the convention by Randolph as its basic working document” (Ketcham, p. 194). On May 29, 1787, Edmund Randolph presented the Virginia Plan, consisting of “fifteen resolutions, which for the next two weeks were the foundation of the debates, and in fact formed the essential frame of government finally offered to the people of the states” (Ketcham, p. 196). The eighth resolution of the plan dealt with the council of revision and read:

Resd. that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of

the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by \_\_ of the members of each branch. (Farrand, I, p. 21)

It can be surmised from Madison's use of British examples in defending his proposed council of revision before the Convention's members that Madison had gotten the idea for such a council from examples provided by the British government. For example, on July 21st, Madison spoke about the British practice of letting judges be in the legislature and in "Executive Councils" in defending his proposal to mix the executive and judicial branches (Farrand, II, p. 77). Madison also mentioned the British practice of submitting "to their (the judges) previous examination all laws of a certain description" (Farrand, II, p. 77). Other Framers also made reference to the British example when discussing the council of revision (Farrand, II, pp. 73 & 75). What actually emerged at the end of the Convention was not the proposed council of revision, but rather a specific provision for a presidential veto that could be overridden by a 2/3 majority in each legislative chamber as well as an unspecified understanding of judicial review being used to void laws judged to be unconstitutional.

To document the Framers unspecified understanding of constitutional review as a check against unconstitutional legislation, one must examine the records of the debates that occurred during the course of the Constitutional Convention. The following Framers spoke in favor of judicial review, indicating by their remarks that such a power not only existed, but also made unnecessary a council of revision:

- Gouverneur Morris, delegate from Pennsylvania.
- Rufus King, delegate from Massachusetts.
- Elbridge Gerry, delegate from Massachusetts.
- Luther Martin, delegate from Maryland.

- Hugh Williamson, delegate from North Carolina.
- Caleb Strong, delegate from Massachusetts.

Their arguments weighed heavily in the votes against the proposed council of revision. In addition, the following acknowledged the existence of judicial review as a check against unconstitutional legislation, but also favored the creation of a council of revision as proposed by the Virginia Plan:

- James Madison, delegate from Virginia.
- George Mason, delegate from Virginia.
- James Wilson, delegate from Pennsylvania.

John Dickinson, delegate from Delaware, waffled on the subject of judicial review during the Convention, speaking for it on June 4th and opposing it on August 15th although he admitted that he was “at a loss what expedient to substitute” for judicial review (Farrand, I, p. 110; Farrand, II, p. 299). However, after the Convention, he wrote clearly in favor of judicial review as an accomplished fact. Writing as “Fabius” in a 1788 letter advocating approval of the Constitution, Dickinson wrote:

In the senate the sovereignties of the several states will be equally represented; in the house of representatives the people of the whole union will be equally represented; and in the president and the federal independent judges, so much concerned in the execution of the laws and in the determination of their constitutionality, the sovereignties of the several states and the people of the whole union may be considered as conjointly represented. (Beard, 1912, p. 20)

Of the fifty-five delegates to the Convention, only two spoke in opposition to a judicial check against the legislature – Gunning Bedford, Jr., from Delaware and John Mercer, delegate from Maryland. Bedford “was opposed to every check on the Legislative, even the Council of Revision first proposed” (Farrand, I, p. 100). According to Madison’s notes, Mercer



“disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontroulable [sic]” (Farrand, II, p. 298). Mercer’s position is somewhat complicated because he favored judicial review of the laws if done in conjunction with the executive branch, even though done as separate departments (Farrand, II, p. 298).

Numerous speeches in a variety of contexts were delivered in favor of judicial review or in acknowledgement of its existence under the new Constitution. In the discussion about the council of revision on Monday, June 4, 1787, Elbridge Gerry spoke against including the judiciary in an executive “Council of Revision” because

they (the judges) will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States, the Judges had <actually> [sic] set aside laws as being agst. the Constitution. (Farrand, I, p. 97)

Gerry then made a motion to suspend the council of revision in order to provide for a sole presidential veto, subject to being overridden by an unspecified percent of the legislature. Rufus King seconded the motion by his fellow delegate from Massachusetts, “observing that the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation” (Farrand, I, p. 98). James Wilson of Pennsylvania then spoke, saying that he didn’t think either the council of revision or the proposed executive veto went “far enough” (Farrand, I, p. 98). If the branches were to be “distinct & independent,” then each of the “Executive & Judiciary” branches should have “an absolute negative” on unconstitutional legislation (Farrand, I, p. 98). The Convention, after voting down (10-0) a motion to give the president an absolute veto that wasn’t subject to being overridden by a subsequent vote of the legislature, then approved (8-2) “Mr. Gerry’s motion which gave the Executive alone without the

Judiciary the revisionary controul on the laws <unless overruled by 2/3 of each branch> [sic]" (Farrand, I, pp. 103 & 104). However, the idea of a council of revision continued to be discussed in subsequent sessions of the Convention, and the concept of judicial review continued to be used in rebuttal of such a council.

On July 17th the Convention discussed the idea of giving Congress the power to "negative all laws passed by the several States" that they deem to be violations of the Constitution. While Madison spoke in favor, Gouverneur Morris opposed it, saying, "A law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. law" (Farrand, II, pp. 27 & 28). The proposal to empower Congress to nullify unconstitutional state laws was then rejected, 7-3 (Farrand, II, p. 28).

On July 21st, James Wilson of Pennsylvania made an attempt to resurrect the council of revision which was supported by Madison (Farrand, II, pp. 73 & 74). Caleb Strong of Massachusetts spoke in opposition, being against any proposal to join together the executive and judicial functions of government. According to Strong (as recorded by Madison),

[T]he power of making ought to be kept distinct from that of expounding the laws. No maxim was better established. The judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws. (Farrand, II, p. 75)

Luther Martin of Maryland also weighed in against Wilson's attempt to give new life to the previously rejected council of revision, describing the idea of combining judicial and executive functions "as a dangerous innovation" (Farrand, II, p. 76). He continued:

[A]s to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating agst. popular measures of the Legislature. (Farrand, II, pp. 76-77)

George Mason spoke in favor of both Wilson's motion and judicial review, believing that both were necessary. Judicial review would invalidate unconstitutional laws while the council of revision would take care of bad laws that might be constitutional, but still "oppressive" and "unjust" (Farrand, II, p. 78). According to Mason:

[I]n this capacity [judicial review] they could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wished the further use to be made of the Judges, of giving aid in preventing every improper law. (Farrand, II, p. 78)

On August 15th, Madison proposed that all acts of Congress be submitted "to the Executive and Supreme Judiciary Departments" before they became law, which was seconded by Wilson (Farrand, II, p. 298). At this point, Mercer made his comments against judicial review being separate, but in support of the motion that submitted the question to both executive and judicial departments (Farrand, II, p. 298). After Gerry reminded the Convention that the motion was "the same thing with what has been already negatived," the Framers voted the motion down, 8-3 (Farrand, II, p. 298).

On August 22nd the Convention debated a proposal to insert into the Constitution a prohibition against passing ex post facto laws. Hugh Williamson of North Carolina couched his support for the proposal in terms of the help it provided judges in reviewing subsequent legislation. According to Madison's notes, Williamson observed, "Such a prohibitory clause is in the Constitution of N. Carolina, and tho it has been violated, it has done good there & may do good here, because the Judges can take hold of it" (Farrand, II, p. 376). The proposal was adopted by a 7-3 vote with North Carolina's delegation being divided and thus unable to cast its vote (Farrand, II, p. 376).

Madison spoke about judicial review on two separate occasions before the Convention, both times illustrating his understanding that the judiciary possessed the power of judicial review. The first occasion took place on July 23rd when the Convention discussed whether to submit the proposed Constitution to the state legislatures for approval or to popular assemblies chosen by the people in each state. Madison opposed sending it to the state legislatures because that would make the “system founded on the Legislatures only” a “*league or treaty*” whereas a system “founded on the people” would truly be “a *Constitution*” (Farrand, II, p. 93). The difference between the two systems held importance for the concept of judicial review.

According to Madison:

A law violating a treaty ratified by a preexisting law, might be respected by the Judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the Judges as null & void. (Farrand, II, p. 93)

The motion to submit the Constitution to the state legislatures for approval was defeated by a 7-3 vote (Farrand, II, p. 93). The subsequent motion to submit the plan to “assemblies chosen by the people” was adopted on a 9-1 vote with only Delaware in opposition (Farrand, II, pp. 93-94).

The second occasion marking Madison’s recognition of judicial review occurred on August 27th when the Convention was discussing the jurisdiction of the Supreme Court contained in Article XI, § 3. Doctor Johnson of Connecticut proposed an amendment which specifically extended jurisdiction to cases “arising Under the Constitution” (Farrand, II, p. 430). Madison raised a question of language, wondering whether or not the jurisdiction “ought not to be limited to cases of a Judiciary Nature” as the Court should only be involved in adjudicating actual cases in terms “of expounding the Constitution” (Farrand, II, p. 430). The Framers approved the motion “nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature” (Farrand, II, p. 430).

The record of the Framers' debates in the Constitutional Convention, much of it in Madison's own hand, clearly indicates both Madison's awareness and acceptance of judicial review as a check upon unconstitutional legislation. The record of the debates provides additional credibility to Hamilton's observations about judicial review in *The Federalist*. It also raises the question of how Madison could later support and advocate attempts by the states to serve as the judgmental body regarding the constitutionality of congressional legislation as he did in the Kentucky and Virginia Resolutions.

## Appendix M

### Propaganda Techniques

**Propaganda:** a specific type of message presentation, aimed at serving an agenda. Even if the message conveys true information, it fails to paint a complete picture. (SourceWatch)

**Appeal to Fear:** When an individual warns member of her audience that disaster will result if they do not follow a particular course of action, she is using the fear appeal. By playing on the audience's deep-seated fears, practitioners of this technique hope to redirect attention away from the merits of a particular proposal and towards steps that can be taken to reduce the fear.

In contemporary politics, the fear-appeal continues to be widespread. When a politician agitates the public's fear of immigration, or crime, and proposes that voting for her will reduce the threat, she is using this technique. When confronted with persuasive messages that capitalize on our fear, we should ask ourselves the following questions:

- Is the speaker exaggerating the fear or threat in order to obtain my support?
- How legitimate is the fear that the speaker is provoking?
- Will performing the recommended action actually reduce the supposed threat? (PropagandaCritic)

**False Dichotomy:** Also called "false dilemma. If someone is saying, "Either this OR that," or is presenting only two alternatives, it is always a good idea to consider they are using this technique. Ask yourself, "Are these really the only two alternatives, or is something being overlooked?" (SantaRosa)

**False Premise:** A false premise is a premise that is untrue or distorted. Logic is the process of drawing a conclusion from one or more premises (or propositions, assumptions, suggestions, ideas). Since the premise is not correct or not fully correct, the conclusion drawn may be in error. To repeat, a false premise is an erroneous proposition on which a statement or conclusion is drawn. (UToledo; Reference)

**Hasty Generalization:** This fallacy involves taking exceptional cases and generalizing from them to a conclusion about ordinary, non-exceptional cases. The fallacy is the assumption that what is true for the exceptional is true for all.

An organization that bars all private use of office computers, because one pervert used it to access child pornography, has fallen into this trap. (GreatDebate)

**Logical Fallacy:** In order to understand what a fallacy is, one must understand what an argument is. Very briefly, an argument consists of one or more premises and one conclusion. A logical fallacy is, very generally, an error in reasoning. (SourceWatch)

**Name Calling:** Name Calling is a form of **ad hominem** attack that draws a vague equivalence between a concept and a person, group or idea. By linking the person or idea being attacked to a negative symbol, the propagandist hopes that the audience will reject the person or the idea on the basis of the symbol, instead of looking at the available evidence. (SourceWatch)

An **ad hominem** argument (*Latin*, literally “argument against the man [or person]”) is a fallacy that involves replying to an argument or assertion by attempting to discredit the person offering the argument or assertion and not addressing their proposition. Properly, it consists of saying that an argument is wrong because of something about the individual or organization is in error rather than about the argument itself. (SourceWatch)

A more subtle form of name-calling involves words or phrases that are selected because they possess a negative emotional charge. Fiscal conservatives making budget cuts can be referred to as either “stingy” or “thrifty.” Both words refer to the same behavior, but they have very different connotations. Other examples include:

- social engineering
- radical
- counter-culture
- cowardly

The Institute for Propaganda Analysis first identified the name-calling technique in 1938. (PropagandaCritic)

**Red Herring:** In the past, to prolong a foxhunt, a herring would be dragged across the path so the dogs would lose the trace of the fox. An advocate who tries to distract the audience from an issue by introducing something irrelevant to the line of reasoning is said to be relying on a red herring. Example:  
 “I am against banning smoking in restaurants – cars cause far more air pollution in urban areas.”

The auto pollution issue is an attempt to divert attention from the restaurant smoking ban. That auto pollution is a bigger problem does not solve the problem of smoking in enclosed places. (GreatDebate)

**Slippery Slope:**

Basically an argument for the likelihood of one even leading to another, invoking the “slippery slope” means arguing that one action will initiate a chain of events that will lead to an undesirable event. The fallacy is about the inevitability of the one event leading to the undesirable outcome. (Wikipedia, Reference)

Using the slippery slope argument, the proposer posits the following inferential scheme:

If A occurs  
then the chances increase that B will occur.

The argument takes on one of various semantical forms:

- In one form, the proposer suggests that by making a move in a particular direction, we start down a “slippery slope”. Having started down the metaphorical slope, it appears likely that we will continue in the same direction, which the arguer sees as a negative direction; hence the “sliding downwards” metaphor.
- Another form appears more static, arguing that admitting or permitting A leads to admitting or permitting B, by following a long chain of logical relationships. The long series of intermediate events serving to connect A to B are an example of the “**camel’s nose**” argument: once a camel has managed to place its nose within a tent, the rest of the camel will inevitably follow. This approach may also relate to the **Conjunction Fallacy**: with a long string of steps leading to an undesirable conclusion, the chance of ALL the steps actually occurring is actually less than the chance of any one individual step occurring alone.

Arguers also often link the **Slippery Slope Fallacy** to the **Straw Man Fallacy** in order to attack an idea or proposition:

1. A has occurred (or will or might occur; therefore
2. B will inevitably happen. (**Slippery Slope**)
3. B is wrong; therefore
4. A is wrong. (**Straw Man**)

The “slippery slope” form of argument is often used to provide evaluative judgments on social change: once an exception is made to some rule, nothing will hold back further, more egregious exceptions to that rule. Contemporary examples include:



- If women are allowed to abort their unborn children, then soon no life will be held sacred.
- If we forbid partial-birth abortion, soon all abortion will become illegal.
- If we allow gay marriage, the family as a strong institution supporting a civil society will disappear.
- If we allow gun registration, then gun confiscation will follow.

The slippery slope claim requires independent justification to connect the inevitability of B to an occurrence of A. (Reference)

The best way to counter the Slippery Slope Fallacy is to point out that there is a logical point at which a line can be drawn which will prevent the slide down the slope. (GreatDebate)

**Straw Man Fallacy:** A type of **Red Herring Fallacy**, the **Straw Man Fallacy** is one of the best-named fallacies because it is memorable and because it illustrates the nature of the fallacy. Imagine a fight in which one of the combatants sets up a man of straw, attacks it, then proclaims victory. All the while, the real opponent stands by untouched.

The Straw Man is a type of Red Herring because the arguer is attempting to refute an opponent's position, but instead attacks a position – the “straw man” – not held by his opponent. In a Straw Man argument, the arguer argues to a conclusion that denies the “straw man” he has set up, but misses the real target. The argument used against the straw man is usually a perfectly good argument; however, in not arguing against the real position the Straw Man fallacy is committed. So, the fallacy is not simply the argument, but the entire situation of the argument occurring in such a context.

As the “straw man” metaphor suggests, the counterfeit position attacked in a Straw Man argument is typically weaker than the opponent's actual position, just as a straw man is easier to defeat than a flesh-and-blood one. Of course, this is no accident, but is part of what makes the fallacy tempting to commit.

A common straw man is an extreme man. Extreme positions are more difficult to defend because they make fewer allowances for exceptions, or counter-examples. Consider the statement form, “all P are Q” and “No P are Q.” Both are extremes, especially when compared with “many P are Q,” “some P are Q,” “some P are not Q,” and “many P are not Q.” The extremes are easiest to refute, since all it takes is a single counter-example to refute a universal proposition. (FallacyFiles)

**Suppressed Evidence:** Also called “Lie By Omission” and “Half-Truths.” This technique is quite subtle. It has the advantage that you can’t get caught in a lie, because everything that you say is true. You just fail to mention all of those bothersome little facts that do not support your point of view. Should a critic point out one of those annoying undesired facts, you can at least feign innocent ignorance, or claim that the fact is really just an unimportant, trivial detail, not worth mentioning. (Orange-papers)

**Unsupported Claim:** A claim that is not supported by facts or other evidence. Senator Joseph McCarthy provided one of the more infamous examples during the 1950s. He would state, “I have in my hand a list of 205 Communists working in the State Department,” as he waved a piece of paper that had no names on it. He never revealed that list of names, or any other list of names of Communists. (Orange-papers)

**Unwarranted Extrapolation:** Recognized as a logical fallacy, an unwarranted extrapolation is the tendency to make huge predictions about the future on the basis of a few small facts.

As Stuart Chase pointed out, “It is easy to see the persuasiveness in this type of argument. By pushing one’s case to the limit, one forces the opposition into a weaker position. The whole future is lined up against him. Driven to the defensive, he finds it hard to disprove something which has not yet happened.

This logical sleight of hand often provides the basis for an effective fear-appeal. Consider the following contemporary example: “If Congress passes legislation limiting the availability of automatic weapons, America will slide down a slippery slope which will ultimately result in the banning of all guns, the destruction of the Constitution, and a totalitarian police state.” (SourceWatch, PropagandaCritic)

When someone tries to convince you that a particular action will lead to disaster (or nirvana), ask yourself if there is enough data to support the speaker’s (or writer’s) predictions, whether you can think of other ways that things might turn out, and if there are, why the speaker is painting such an extreme picture and advocating just one approach? (GreatDebate)

**Note:** Since the intent is to provide information about the various propaganda techniques, I did not utilize a formal style incorporating quotation marks, ellipsis points, and standard citations. The descriptions are basically word-for-word, but in some I paraphrased and blended together material from more than one source while in others I eliminated some wordy portions or redundant material. I credited sources at the end of paragraphs or sections using the term immediately following the www portion of the web address,

which I capitalized while maintaining the run-together form of the terms. In this manner I hope to use a fluid readability to promote understanding of the fallacies, while still maintaining accountability.

**The following were retrieved on 2-14-06 from the following sites:**

**<http://www.greatdebate.info/tc/logical.html>  
<http://www.propagandacritic.com/articles>  
<http://reference.com/browse/wiki/>  
<http://www.santarosa.edu/~dpeterso/permanenthtml/>  
<http://www.sourcewatch.org/index>  
<http://www.h2000.utoledo.edu/hs/clay/ListenSkills.html>  
[http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page)**

**The following was retrieved on 2-27-06 from:**

**<http://www.orange-papers.org/orange-propaganda.html>**

**The following was retrieved on 3-01-06 from:**

**<http://www.fallacyfiles.org>**

## Appendix N

### A Government of Laws Or of Men? The Answer Provided By the Actions of Archibald Cox

The reader previously encountered Archibald Cox as Solicitor General in connection with his argument before the Court in the apportionment case, *Baker v. Carr* (1962) (See discussion of the case in Chapter Five of this paper). Archibald Cox, of course, is the individual who later earned national status as an exemplar of integrity through his duties as the Special Watergate Prosecutor. It would be his belief (as well as that of others) in an ages-old answer to an equally ancient question (the answer being that government should be the rule of law and not of men), which would precipitate a series of events leading to the infamous Saturday Night Massacre, to subsequent impeachment proceedings, and finally to Nixon's resignation from the office of President of the United States (For information about the "ancient question," as well as answers provided by others that were uncovered in the course of this investigation, see the following notes in this paper: n. # 46, n. # 67).

Following disturbing disclosures about Watergate (the criminal break-in of National Democratic Headquarters in Washington D.C. on June 17, 1972, by Republican operatives during Richard Nixon's presidential re-election campaign) that resulted in the resignations of Richard Kleindienst as Attorney General, H.R. Haldeman and John Ehrlichman as presidential advisors, and John Dean as Nixon's special counsel, President Nixon nominated his then secretary of defense, Elliot Richardson, to be the new attorney general. In the meeting where Nixon offered the position to Richardson, President Nixon raised the idea of appointing a special prosecutor (Gormley, p. 247). According to Richardson, "The president made clear that Richardson 'could decide whether to appoint, and if so whom'" (Gormley, p. 248). After his

first seven choices for the special prosecutor position turned him down, Richardson turned to his former law professor at Harvard, “Archie” Cox (Gormley, pp. 233-234). During hearings before the Senate Judiciary Committee in May of 1973, Richardson testified that “he’d give independence” to the special prosecutor, and Cox testified that “he’d exercise it [independence]” (Gormley, p. 243). A key exchange occurred between Cox and Senator Byrd during the hearing, which was described by a professor of law:

Cox had promised the committee to pursue the trail of any crime, regardless of its scope or implications. Senator Byrd had pressed, “even if that trail should lead, heaven forbid, to the Oval Office of the White House itself?” “Wherever that trail may lead,” Cox had assured the senator. (Gormley, p. 243)

Occurring concurrently with the news broken by the *Washington Post* “that former White House chief of staff H.R. Haldeman had allegedly instructed the CIA to block the Watergate investigation, at the urging of the president himself,” the contrast between the news in the *Post* and the responses at the Senate Judiciary Committee reassured senators as Richardson was confirmed by the Senate Judiciary Committee and the full Senate with the understanding that Cox would be appointed as a special prosecutor to investigate Watergate. Following his confirmation, Attorney General Richardson issued a directive “to all Justice Department personnel when Cox was appointed” by him to be the Special Watergate Prosecutor (Gormley, p. 297). The directive “vested Cox with ‘full authority for investigating and prosecuting’ not only the Watergate case but all ‘allegations involving the President, members of the White House staff, or Presidential appointees’” (Gormley, p. 297).

Having learned of the possible existence of taped presidential conversations, Cox met with White House attorneys on June 6, 1973 and requested notes and memos regarding a meeting between President Nixon and Henry Petersen, the assistant attorney general in charge of the

Criminal Division of the Justice Department, as well as a tape recording of a meeting between President Nixon and John Dean, White House Counsel (Gormley, pp. 274-275). In addition Cox requested the “White House logs that listed all calls and visits between key White House aides and President Nixon between June 1972 and May 1973” (p. 275). The latter item was all that Cox received.

On July 16, 1973, Alexander Butterfield testified before the Senate Watergate Committee, chaired by Senator Sam Erwin of North Carolina, “about the elaborate taping system installed in the White House by President Nixon” (Gormley, p. 284). Two days later, on July 18th, Cox requested eight tapes from the President’s counsel for a grand jury proceeding “investigating the unauthorized entry into the Democratic National Committee Headquarters and related offenses” (*In re Subpoena to Nixon*, 360 F. Supp. 1, 3, n. 1; see also Gormley, p. 286). On July 23, the same day Nixon refused Cox’s request, Cox issued a subpoena to President Nixon for nine tapes (Gormley, p. 289). Nixon wrote to Judge Sirica at the federal district court house on July 25 and declined to provide the subpoenaed tapes. The following day Cox met with the grand jury, “read the White House letter and explained why these nine tapes ... were crucial to his investigation” (Gormley, p. 292). On July 26 the federal grand jury voted unanimously “to seek an order from Judge Sirica directing the president of the United States to ‘show cause why there should not be full and prompt compliance’” (Gormley, pp. 292-293). Subsequently Judge Sirica issued a “grand jury subpoena *duces tecum*” that ordered President Nixon “to provide the documents or respond to Cox’s Rule to Show Cause” (360 F. Supp. 1, 3, n. 1; Gormley, p. 293). On August 7, “the day of the deadline set by Judge Sirica,” Nixon’s attorneys filed a “response to Cox’s Rule to Show Cause, refusing to turn over any documents or tapes” (Gormley, p. 300).

As a result, on August 22 both sides presented arguments to Judge Sirica in U.S. District Court, District of Columbia, “on the question of producing nine White House tapes” (Gormley, p. 300).

On August 30 Judge Sirica announced his ruling in the case *In re Subpoena to Nixon*, 360 F. Supp. 1 (1973). Sirica’s opinion read:

Ordered that respondent, President Richard M. Nixon, or any subordinate officer ... with custody or control of the documents or objects listed in the grand jury subpoena *duces tecum* of July 23, 1973, ... is hereby commanded to produce forthwith for the Court’s examination *in camera*, the subpoenaed documents or objects which have not heretofore been produced to the grand jury. (360 F. Supp. 1, 3)

After quoting from Chief Justice Marshall’s ruling in *United States v. Burr*, Judge Sirica noted that Marshall had “concluded that, contrary to the English practice regarding the King, the laws of evidence do not excuse anyone because of the office he holds” (360 F. Supp. 1, 10).

Continuing that line of thought, Sirica declared:

In all candor, the Court fails to perceive any reason for suspending the power of courts to get evidence and rule on questions of privilege in criminal matters simply because it is the President of the United States who holds the evidence. (360 F. Supp. 1, 10)

According to the Court’s summary, Judge Sirica noted that “in camera inspection of the tape recordings ... was required to balance the forcible showing of necessity by the grand jury against the need for protection of presidential deliberations” (360 F. Supp. 1). As stated by Sirica, “The Court is simply unable to decide the question of privilege without inspecting the tapes” (360 F. Supp. 1, 14). Continuing, Judge Sirica further noted, “[T]here is every reason to suppose an *in camera* examination will materially aid the Court in its decision” (360 F. Supp. 1, 14). In conclusion, Judge Sirica observed:

The Court has attempted to walk the middle ground between a failure to decide the question of privilege at one extreme, and a wholesale delivery of tapes to the grand jury at the other. The one would be a breach of duty; the other an inexcusable course of conduct. (360 F. Supp. 1, 14)

Nixon appealed, and on September 12th the tapes issue was argued before the Circuit Court of Appeals for the District of Columbia. This court issued a preliminary decision that ordered “the White House and the special prosecutor to work out their differences” by September 20 or face a subsequent “binding decision” (Gormley, p. 308). As this order didn’t prove to be successful, the circuit court issued a 5-2 ruling on October 12 that “swept aside the president’s claim of executive privilege” and ruled that “the tapes were necessary to the grand jury’s investigation” (Gormley, p. 313). Noting that the “Constitution [made] no mention of special presidential immunities,” and that such constitutional “silence cannot be ascribed to oversight,” the Circuit Court answered, as it were, Aristotle’s ancient question with the following:

[T]he President ... does not embody the nation’s sovereignty. He is not above the law’s commands: “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law...” Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen. (487 F.2d 700, 711)

Nixon had claimed that the President, “rather than the courts, ha[d] final authority to decide whether [the claim to executive privilege] applies in the circumstances” (487 F.2d 700, 713). Responding to Nixon’s claim for absolute executive privilege, the Circuit Court began by quoting from the Supreme Court’s ruling in *United States v. Reynolds*, 345 U.S. 1 (1953):

“The court itself must determine whether the circumstances are appropriate for the claim of privilege;” “judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” (487 F.2d 700, 714)

Moving forward in time to the preceding court term, the Circuit Court noted its ruling in *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 793 (1971), in which the Circuit Court had stated, “Any claim to executive absolutism cannot override the duty of the



court to assure that an official has not exceeded his charter or flouted the legislative will” (487 F.2d 700, 714). Stating that they would “adhere to the *Seaborg* decision,” the Circuit Court continued by connecting *Seaborg* and *Reynolds* to the case most often cited as an affirmation of judicial review: “To do otherwise would be effectively to ignore the clear words of *Marbury v. Madison*, that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is’” (487 F.2d 700, 714). After noting that “it [was] the courts that determine the validity of the assertion and the scope of the privilege,” the Court concluded that such was required by the “separation of powers doctrine” (487 F.2d 700, 714-715). The Circuit Court continued, “To leave the proper scope and application of Executive privilege to the President’s sole discretion would represent a mixing, rather than a separation, of Executive and Judicial functions” (487 F.2d 700, 715). Nixon’s attorneys had until Friday, October 19, to file an appeal with the U.S. Supreme Court.

No appeal was filed. Instead, the White House announced “on the late-evening news programs” that “the President will not give up the tapes and [would] not appeal to the Supreme Court” (Drew, p. 46). According to the press release, Nixon declared, “I have felt it necessary to direct him [Cox], as an employee of the Executive Branch, to make no further attempts by judicial process to obtain tapes, notes or memoranda of Presidential conversations” (White, pp. 263-264). The press release continued: “Under the Constitution, it is the duty of the President to see that the laws of this nation are faithfully executed. My actions today are in accordance with that duty, and in that spirit of accommodation” (White, p. 264). One historian evaluated the President’s reply in the following manner:

The statement was, in its own terms, a masterpiece of political art – it floated on a rhetoric of conciliation, compromise and earnest good will. What it left out, flatly, was the fact that the President was *not* complying

with the order the Court of Appeals had issued the previous Friday.  
(Emphasis in original) (White, p. 264)

Cox, having obtained a copy of the White House statement in a phone call to “the *Los Angeles Times* Washington Bureau,” issued his own statement in which he “nailed the deceit” of the White House statement (Gormley, p. 343; White, p. 264). The Special Watergate Prosecutor’s statement read:

In my judgment the President is refusing to comply with the Court decrees.... The instructions are in violation of the promises which the Attorney General made to the Senate when his nomination was confirmed. For me to comply to those instructions would violate my solemn pledge to the Senate and the country to invoke judicial process to challenge exaggerated claims of executive privilege. I shall not violate my promise.  
(White, p. 264)

The following Saturday, October 20, 1973, Cox held a news conference and reiterated that he would not obey the order issued by the President because “to obey the order would be a violation of [my] duties” (Drew, p. 46).

That evening, Nixon ordered Attorney General Elliot Richardson to fire Special Watergate Prosecutor Archibald Cox. Such an order violated the guidelines worked out by the Department of Justice which read: “The Attorney General will not countermand or interfere with the Special Prosecutor’s decisions or actions;” and “The Special Prosecutor will not be removed from his duties except for extraordinary improprieties” (Drew, p. 49). Richardson refused Nixon’s order and submitted his resignation. Nixon then ordered the next individual in the chain of command at the Department of Justice, Deputy Attorney General William Ruckelshaus, to fire Cox. Ruckelshaus refused as well and submitted his resignation. Nixon then ordered the third-in-command at the Justice Department, the newly appointed Solicitor General Robert Bork, to fire Cox, which Bork proceeded to do (Drew, pp. 51-53; Gormley, pp. 356-358). As one journalist described it, “An enigmatic President has summarily fired three men – men who had

built up some public trust” (Drew, p. 52). The press referred to the multiple events of Saturday, October 20, as “The Saturday Night Massacre” (Gormley, p. 361).

Archibald Cox’s last official act as Special Watergate Prosecutor was to issue a one-sentence statement for the public, a statement recalling Aristotle’s ancient question, the answers to which threaded their way through the nation’s legal and political history: “Whether ours shall continue to be a government of laws and not of men is now for Congress and ultimately the American people” (Gormley, p. 358; see also Drew, p. 53).

The American public’s response was immediate and overwhelming, so much so that it was portrayed by the Nixon people as an erupting “‘firestorm’ of public opinion,” a protest later described as “so intense and dramatic that no single participant in the Watergate affair could have ever predicted its fury” (Gormley, p. 361). One journalist wrote:

“Firestorm.” I had always thought of the word in connection with the firestorm of Dresden, in the Second World War – a word of terrifying connotations, like “holocaust.” A word one would use with care. Reporters believe that the word was first used in connection with last weekend by [Nixon press secretary] Ron Ziegler. (Drew, p. 66)

According to historian Theodore White, “[T]he explosion of public sentiment after the Saturday night firing of Archibald Cox was as fierce and instantaneous as the day Pearl Harbor had been attacked, or the day John F. Kennedy had been assassinated” (Gormley, p. 362). Over “450,000 Mailgrams and telegrams,” an amount that was “nearly quadruple the previous record,” were sent to the Capitol and the White House criticizing Nixon’s actions against the Watergate Special Prosecutor in the days following the Saturday Night Massacre (Gormley, p. 362). Describing the unprecedented outpouring of public criticism of White House actions, one Congressman observed that “[I]t was ‘as if a dam had broken’” (White, p. 268). According to a television news reporter:

The events of that weekend caused something to snap in the country. Some fragile membrane of patience and tolerance broke and Washington was deluged with telegrams of outrage and demands for impeachment. It was in reaction to that “firestorm,” as White House aides called it, that the hitherto reluctant House Judiciary Committee began to crank up the complicated machinery for impeachment proceedings. (Rather & Gates, p. 311)

During the week following the events of October 20, “House members introduced twenty-two separate bills calling for the impeachment of the president or investigation into impeachment proceedings” (Gormley, p. 380). Joining together in a petition, the deans of seventeen law schools (which included Stanford, Yale, Columbia, and Harvard) requested “that Congress ‘consider the necessity’ of impeachment now” (White, pp. 268-269). The House Judiciary Committee began preparing for impeachment proceedings “for the first time in 105 years,” and on October 30, “the House Judiciary Committee granted sweeping subpoena power to Chairman Peter Rodino, who pledged to proceed ‘full steam ahead’” (Gormley, pp. 380; 380, n. 21).

Summarizing the thinking that precipitated the firestorm of public opinion, one historian wrote:

The White House had defied the courts. If the law did not bind the President to obedience in this instance, what laws could prevent him from other abuses of power, public or secret? The question was now not one of burglary, break-in, cover-up, but of power itself – and the White House had been caught in a total misreading of the American mind. (White, pp. 269-270)

In response to the overwhelming public and political criticism, the White House did an about-face and capitulated.

Within three days, Charles Alan Wright, the President’s Constitutionalist, stood before Judge Sirica to capitulate, to announce that the President would yield the tapes demanded. “This President does not defy the law,” said Wright, though his client three days before had done exactly that. (White, p. 270)

In another note, Ralph Nader and others filed a law suit against Robert Bork because of his role in firing Cox.<sup>123</sup> Cox was not involved in the suit and “disavowed any connection with

it” (Gormley, p. 383). On November 14, 1973 the U.S. District Court for the District of Columbia ruled in *Nader v. Bork*, 366 F. Supp. 104 (1973), that Bork’s action in firing Cox as Special Watergate Prosecutor “was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal” (Gormley, p. 383). The regulation to which District Court Judge Gesell referred was the agreement reached by Richardson and Cox, an agreement that Attorney General Richardson had published in the *Federal Register* on June 4, 1973 that gave the agreement the force of law (366 F. Supp. 104, 107, n. 4). The ruling did not have the effect of reinstating Cox, and he “refused to seek any remedy in connection with [the] ruling” because Cox thought that “Ralph Nader was just distracting attention from the real issue” (Gormley, p. 383). According to Archibald Cox, the real issue resided in the answer that America would provide to the question first posed by Aristotle more than 2,000 years previous to the events of 1973. In Cox’s view:

The issue wasn’t one of whether Cox ha[d] a job or not. What happened to Cox was of no importance. The issue was whether the president of the United States was going to be subject to the law as declared by the courts of the land. (Gormley, p. 383)

America’s answer to the question posed by Aristotle contained several strands: the efforts of investigative journalists operating under the assumption of a free press; the integrity possessed by both an Attorney General and a deputy Attorney General that required them to take a conscientious stand based upon principle and honesty in opposing unprincipled, self-serving orders issued by their supervisor; the actions of a Special Watergate Prosecutor who viewed his job as an integral part of the American answer to Aristotle’s ancient question; an American public who rose in indignation at an American president’s attempts to place himself above the law; as well as the efforts provided by the two other branches of government provided by the Framers, who had embedded the doctrine of the Separation of Powers in the Constitution.

Although separate activities, the individual strands wove together around the core response of America's answer, an answer that one commentator tied in with a previous answer given previously by another civilization, that represented by the Republic of Rome. The commentator drew attention to two separate federal government actions that occurred on the same day in July of 1974. On the morning of July 24th, the U.S. Supreme Court issued its ruling in *United States v. Nixon*, an opinion that "reined in extravagant assertions of President Richard Nixon's lawyers, who claimed presidential power to be unlimited, especially as to foreign and defense matters, and defined solely by a president's own judgment" and which proclaimed "that no one is above the law" (Hall, 1992, p. 593). During the evening hours of that same day, July 24, 1974, Chairman Peter Rodino called to order the Judiciary Committee of the House of Representatives so that official impeachment proceedings could begin. The commentator continued by noting that the members of the House Judiciary Committee would, over the course of the "next six days,"

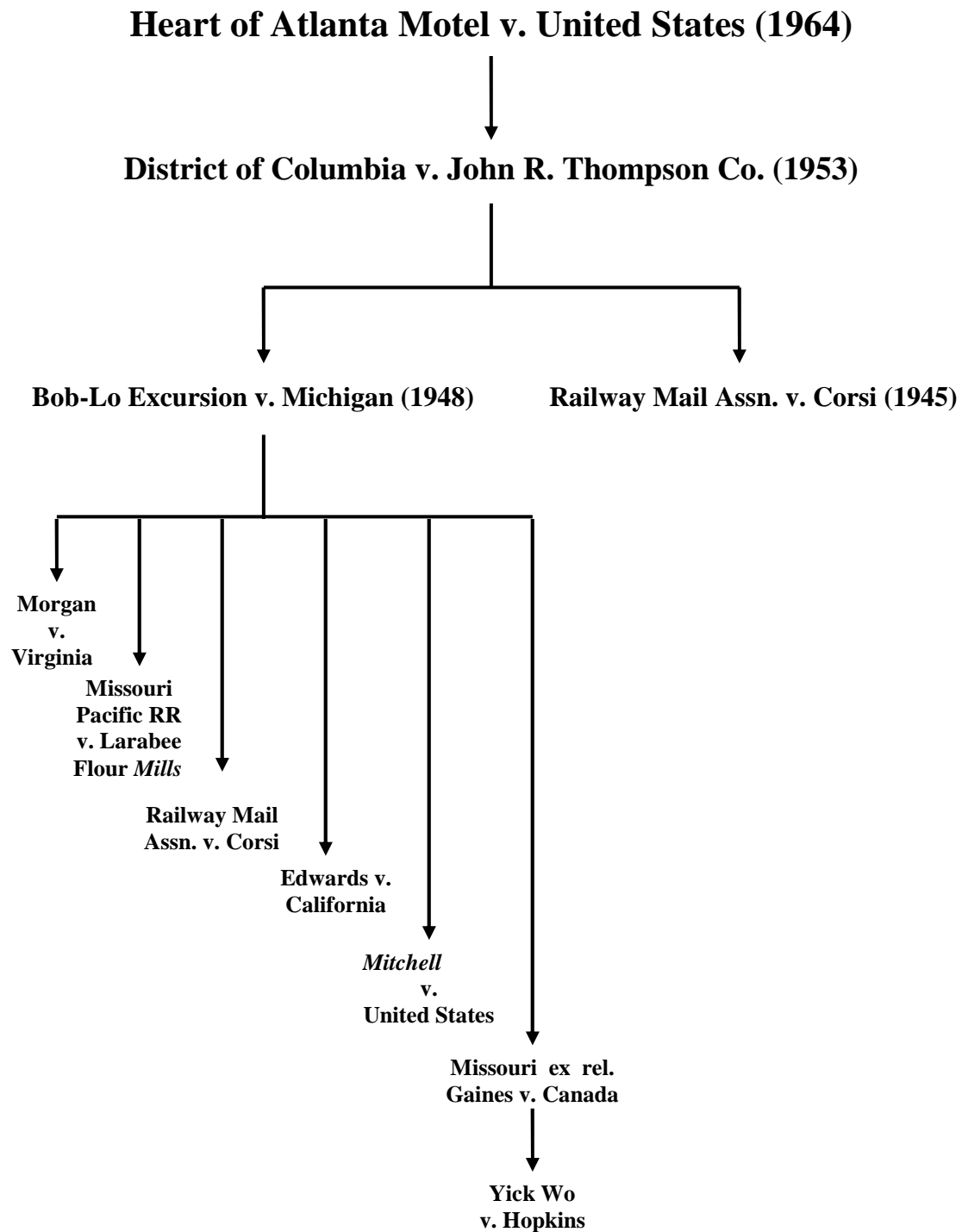
act to define power – theirs, the people's and the President's – in rolling, vivid and brilliant debate for all the world to see and hear. "*Fiat justitia, ruat coelum*," the Roman lawmakers had said. "Let Justice be done, though the heavens fall." Justice, at every level of American power, was now under way: in two weeks a President would fall. (Emphasis in original) (White, p. 5)

Perhaps it is appropriate to conclude with the answer (as well as the reasoning) provided by Aristotle to the question he posed in the fourth century B.C.E.<sup>124</sup> so that the reader may compare the various responses offered. According to Aristotle:

To invest the law then with authority is, it seems, to invest God and intelligence only; to invest a man is to introduce a beast, as desire is something bestial and even the best of men in authority are liable to be corrupted by anger. We may conclude then that the law is intelligence without passion *and is therefore preferable to any individual*. (Emphasis in translation) (Aristotle, Book III, ch. xvi; Weldon, p. 154)

## Appendix O

**Judicial Precedent-Building For Eroding the Legal Protections of Racial Discrimination In Public Accommodations: An Annotation of Mid-Twentieth Century Civil Rights Case Law**



As can be seen from the illustration on the preceding page, *District of Columbia v. John R. Thompson Co.* was the only case cited by the Court in *Heart of Atlanta Motel v. United States*. However, that 1953 Court ruling represented the tip of an iceberg of prior case law, much of it within the decade preceding 1953.

The two cases cited by the Court in its *District of Columbia* ruling constituted a strategic point in that both cases, *Bob-Lo Excursion Co. v. Michigan* and *Railway Mail Assn. v. Corsi*, affirmed state supreme court decisions upholding state-enacted civil rights legislation in the respective states of Michigan and New York. The Court's *Bob-Lo* decision contained a plethora of recently decided cases in addition to one late nineteenth-century case, *Yick Wo v. Hopkins*, whose decision had lain dormant for better than half a century. Finally, while the *District of Columbia* ruling cited two cases upholding state supreme court decisions that validated state laws prohibiting segregation in public accommodations and travel, the referenced *Bob-Lo* decision cited a case where the U.S. Supreme Court overturned a state supreme court decision validating a state law requiring segregation in public accommodations and travel.

The cases listed on the previous page will be briefly annotated for the purpose of providing contextual information in order to deepen both an understanding of and appreciation for the careful work involved in building case law.

### ***District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100 (1953).**

Justice William O. Douglas wrote and delivered the Court's opinion whereby the Court held Congress had delegated law-making powers to the District of Columbia that included the police power to adopt laws prohibiting racial discrimination. The District of Columbia had enacted two laws, one in 1872 and the other in 1873, that made "it a crime to discriminate against a person on account of race or color or to refuse service to him on that ground" (p. 101).

The Thompson Company, owner of several restaurants, was prosecuted in a criminal proceeding "for refusal to serve certain members of the Negro race at one of its restaurants in the District of Columbia solely on account of the race and color of those persons" (p. 100). Upon conviction, the company appealed to the Court of Appeals for the District of Columbia Circuit, who overturned the conviction. On appeal, the U.S. Supreme Court overturned the Circuit Court's ruling, thus affirming the criminal court's conviction of the restaurant company.

The particular citation referred to by the Court in its *Heart of Atlanta Motel* ruling follows:

And certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in



the use of facilities serving a public function is within the police power of the states. See *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 93-94; *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 34. (p. 109)

***Railway Mail Assn. v. Corsi*, 326 U.S. 88 (1945).**

Thurgood Marshall and members of his legal team filed a brief of *amicus curiae* for the National Association for the Advancement of Colored People (NAACP). The New York Civil Rights Law prohibited “any ‘labor organization’” from denying “any person membership by reason of his race, color or creed” (p. 88). The Railway Mail Association, “an organization of regular and substitute postal clerks, limit[ed] its membership to persons of the Caucasian race and native American Indians” (p. 88). Officers of one of the Railway Mail Association’s “branch associations raised the question of [the Association’s denial of membership based on race] with the ... State of New York” (p. 91). Believing that New York’s Civil Rights Law would be enforced against it, the Railway Mail Association filed suit in state court seeking “an injunction restraining enforcement against it” (p. 91). The lower state court granted the injunction, but the Appellate Division reversed the lower state court’s ruling. On appeal to the New York [Supreme Court], the Appellate Division’s ruling was affirmed. The New York Supreme Court’s ruling was appealed to the U.S. Supreme Court.

The Railway Mail Association argued that the New York Civil Rights Law “offend[ed] the due process clause of the Fourteenth Amendment as an interference with its right of selection to membership and abridgment of its property rights and liberty of contract” (p. 93). The Court responded:

A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color, or creed... (pp. 93-94)

The Court unanimously upheld the New York State Supreme Court’s ruling. In a separate concurring opinion, Justice Frankfurter characterized the Association’s claim as being “devoid of constitutional substance,” and remarked:

[A] state may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another’s hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. (p. 98)

***Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948).**

Thurgood Marshall and his legal team filed a brief of *amicus curiae* for the NAACP. The Michigan Civil Rights Act stated:

All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities, and privileges of inns, hotels, restaurants, eating houses, barber shops, billiard parlors, stores, public conveyances on land and water, theatres, motion picture houses, public educational institutions, in elevators, on escalators, in all methods of air transportation and all other places of public accommodation, amusement, and recreation... (p. 32)

The Michigan Civil Rights Act, in similar fashion to the New York Civil Rights Act, was passed in the wake of the Court's decision in the *Civil Rights Cases* wherein the Court had ruled that the Fourteenth Amendment did not protect the public accommodations requirements of the U.S. Civil Rights Act of 1875. Since the public accommodations requirements of the 1875 Act had no constitutional justification, they constituted "an impermissible attempt ... to create a ... code regulating the private conduct of individuals in the area of racial discrimination" (Hall, 1992, p. 149). Michigan was one of "many states" to have passed such state civil rights legislation at the time (p. 33). According to the Court, "Seventeen other states have similar, and in many instances substantially identical, legislation. The statutory citations are given in *Morgan v. Virginia*, 328 U.S. 373, 382, n. 24" (p. 33, n. 10).<sup>125</sup>

The term, Bob-Lo, was a "corruption" of Bois Blanc Island, a "part of the Province of Ontario, Canada," that was located "just above the mouth of the Detroit River, some fifteen miles from Michigan's metropolis upstream" (p. 29). Bob-Lo was thought of as Detroit's "Coney Island" (p. 29). Besides owning "almost all of Bois Blanc in fee," which it operated "as a place of diverse amusements," the Bob-Lo Excursion Company owned and operated "two steamships for transporting its patrons of the island's attractions from Detroit to Bois Blanc and return" (p. 29).

Sarah Elizabeth Ray, an employee of the Detroit Ordnance District and also part of a class being "conducted at the Commerce High School under the auspices of the ordnance district," planned to take part in a class "excursion to Bois Blanc" (p. 30). According to the facts set forth by the Court, "All [thirteen girls] were white except Miss Ray" (p. 30). After the girls had purchased their tickets and boarded the boat, Miss Ray was "escorted," over her objections, from the boat "because she was colored" (p. 31).

Upon a complaint filed by Miss Ray, "criminal prosecution followed ... for violation of the Michigan civil rights act in the discrimination practiced against Miss Ray" (p. 31). The Bob-Lo Excursion Company was found "guilty as charged" by the Recorder's Court for Detroit and "sentenced ... to pay a fine of \$25" (p. 31). Upon appeal the Michigan Supreme Court affirmed the lower court's ruling, which was then appealed to the U.S. Supreme Court.

The U.S. Supreme Court affirmed the Michigan Supreme Court's decision, 7-2, with Chief Justice Hughes and Justice Jackson dissenting. The Court stated:

It is difficult to imagine what national interest or policy ... could reasonable be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so. Certainly there is no national

interest which overrides the interest of Michigan to forbid the type of discrimination practiced here. (p. 40)

Interestingly, the prior case law was not cited in the majority opinion, but instead in Justice Douglas's concurring opinion. Those cases will be each treated separately in the following material in the order in which they were cited in the concurrence of Justice Douglas. The case citation will also include the pages of the ruling to which Douglas specifically referred when he so specified.

***Morgan v. Virginia*, 328 U.S. 373 (1946).**

Thurgood Marshall argued the case on behalf of the appellant, Ms. Morgan. The 7-1 Court held that a Virginia law requiring segregation of passengers on interstate motor buses was unconstitutional because "separation of races in interstate transportation" interfered with interstate commerce (p. 386). The Court's decision overturned the ruling by the Supreme Court of Appeals of Virginia, which had previously upheld the validity of the Virginia statute. Both the historical context and significance of *Morgan v. Virginia* were noted by one of America's eminent historians, C. Vann Woodward, in his noted work, *The Strange Career of Jim Crow*:

Because of its historic interest as one of the earliest areas in which the Jim Crow lawmakers entered, and because the Jim Crow car became the very symbol of the system, segregated transportation deserves special notice. The Supreme Court followed a course it took in other fields by first sharpening its insistence on equality of accommodations in allegedly 'separate but equal' [sic] facilities, and then eventually ruled out segregation itself.... Not until 1946 did the Court, in *Morgan v. Virginia*, throw out a state law requiring segregation of a carrier crossing state lines. (Woodward, 1966, p. 140)

***Missouri Pacific R. Co. v. Larabee Flour Mills Co.*, 211 U.S. 612, 619, 623-624 (1909)**

Drawing upon previous Court incorporation of common law in support of state attempts to prohibit unequal treatment, Justice Douglas cited this case in support of the following statement: "The common-law duty of carriers was to provide equal service to all, a duty which the Court has held a State may require of interstate carriers in the absence of a conflicting federal law" (333 U.S. 28, 41).

Although the principle cited by Douglas emerged from a context not involving racial discrimination, the principle applied to discrimination regardless of what provided the basis for prejudicial action. Larabee Flour Mills had obtained a Kansas Supreme Court ruling directing the Missouri Pacific Railway Company to provide the mill with the same rail service it was providing to other companies situated along its lines. The railroad obtained a writ of error from the U.S. Supreme Court; however, the Court affirmed the ruling of the Kansas Supreme Court.

***Railway Mail Assn. v. Corsi*, 326 U.S. 88 (1945).**

Although already discussed as one of the two cases cited by the Court in *District of Columbia v. John R. Thompson Co.*, Justice Douglas also cited the same case in his concurring opinion for *Bob-Lo Excursion Co. v. Michigan*. The reader will recall that Thurgood Marshall submitted a brief for *amici curia* on behalf of the NAACP. Justice Douglas cited the *Corsi* decision in support of the following legal principle: “[T]he police power of a State under our constitutional system is adequate for the protection of the civil rights of its citizens against discrimination by reason of race or color” (333 U.S. 28, 41).

***Edwards v. California*, 314 U.S. 160 (1941).**

Justice Douglas cited this case in support of his statement that Congress wouldn’t pass a law conflicting with Michigan’s Civil Rights Act because Congress had no power “to create different classes of citizenship according to color so as to grant freedom of movement ... to certain classes only” (333 U.S. 28, 42). Interestingly, Justice Douglas had offered a separate concurring opinion in *Edwards v. California*, a Court decision that struck down “a California statute, popularly known as the ‘Okie Law,’” which had “prohibited a person from bringing any nonresident indigent person into California” (Hall, 1992, p. 245).

In its ruling, the Court indicated “that it would not accept stereotypical judgments about the poor as justification for laws discriminating against them” (Hall, 1992, p. 245). Edwards had been charged with violating the California statute when he was apprehended by authorities transporting his wife’s unemployed brother, Duncan, from Texas to the Edwards’ home in California. California, characterizing Duncan as a pauper, cited the following passage from a prior Court ruling in support of its contention that “the limitation upon State power to interfere with the interstate transportation of persons [was] subject to an exception in the case of ‘paupers’” (p. 176):

In *City of New York v. Miln*, 11 Pet. 102, at 143, it was said that it is “as competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, ...” (p. 176)

In response to California’s assertion that Duncan was a “pauper” within the meaning of the Court’s decision in *City of New York v. Miln*, the Court responded:

But assuming that the term is applicable to him [Duncan], we do not consider ourselves bound by the language referred to. *City of New York v. Miln* was decided in 1837. Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a “moral pestilence. Poverty and immorality are not synonymous. (p. 177)

***Mitchell v. United States*, 313 U.S. 80, 94 (1941).**

This was an action protesting the lack of equality under the existing “Separate But Equal” principle upheld by the Court in *Plessy v. Ferguson*. Arthur W. Mitchell, a member of the U.S. House of Representatives, had purchased a first-class ticket in a “Pullman sleeping car” for a journey by rail from Chicago, Illinois to Hot Springs, Arkansas on April 20, 1937 (p. 89). The Court recounted the facts:

Shortly after leaving Memphis and crossing the Mississippi River into Arkansas, the train conductor ... compelled [Mitchell] over his protest and finally under threat of arrest to move into the car provided for colored passengers. This was in purported compliance with an Arkansas statute requiring segregation of colored from white persons by the use of cars or partitioned sections providing “equal, but separate and sufficient accommodations” for both races. (p. 89)

Besides losing his air-conditioned sleeping compartment, the Honorable Representative Mitchell also lost access to “the train’s only dining-car and only observation-parlor car” (p. 90). The coach to which the congressman was removed “was ‘an old combination affair,’ not air-conditioned, ... [and] without wash basins, soap, towels or running water [and flush toilets] except in the women’s section” (p. 90). The car was described as being “filthy and foul smelling” (pp. 90-91).

Congressman Mitchell filed a complaint with the Interstate Commerce Commission who, after conducting an investigation and hearing, dismissed the complaint. Five of the Commissions members dissented from the decision (See p. 92). Upon review as provided by the Interstate Commerce Act, the U.S. District Court for Northern Illinois upheld the Interstate Commerce Commission’s decision, which was then appealed to the U.S. Supreme Court (See pp. 81, 93). In a 9-0 decision, the Court reversed the decision made by the Commission and upheld by the lower court because “the discrimination shown was palpably unjust and forbidden by the Act” (p. 97).

This legal action presented a number of interesting points. First, the U.S. Justice Department sided with Congressman Mitchell against a federal administrative bureaucracy, the Interstate Commerce Commission, with the nation’s Solicitor General arguing before the Court “that the Commission erroneously supposed that the Arkansas Separate Coach Law applied to an interstate passenger” (pp. 88, 92).

The second point of interest arose from the collision between interstate commerce and “the separate coach laws of the several States,” which were enacted in the aftermath of the *Plessy* decision as part of “the Jim Crow code of discrimination and segregation” (p. 81; Woodward, p. 116). With the passage of the Interstate Commerce Act, Congress had taken aim at “the evil of discrimination” (p. 94). Furthermore, according to the Court, there was “no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach” (p. 94). Drawing attention specifically to the Act, the Court summarized and quoted the following:

Paragraph 1 of § 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act “to subject any particular person ... to

any undue or unreasonable prejudice or disadvantage in any respect whatsoever.” 49 U.S.C. 3. (p. 95)

Continuing, the Court further noted:

From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race and the duty of carriers to provide equality of treatment with respect to transportation facilities. (p. 95)

The third point of interest provided by the case was the number and identity of states whose attorneys general submitted briefs “as *amicus curia*” urging the Court to affirm the decision of the Interstate Commerce Commission as upheld by the federal District Court.<sup>126</sup> The list illustrated states where both state and public support for discriminatory actions ranked among the highest in the nation. However, it was not an exclusive listing of states where racial prejudice was to be found.

Justice Douglas cited *Mitchell v. United States* in his concurring opinion, *Bob-Lo Excursion Co. v. Michigan*, in support of the following proposition:

If a sister State undertook to bar Negroes from passage on public carriers, that law would not only contravene the federal rule [barring such discrimination] but also invade a “fundamental individual right which is guaranteed against state action by the Fourteenth Amendment.” *Mitchell v. United States*, *supra*, p. 94. (333 U.S. 28, 42)

It should be noted that although the Court discussed the intersection of the Fourteenth Amendment and the “state action” posed by the Arkansas statute requiring racial discrimination, the Court’s decision was based on the violation of the Interstate Commerce Act’s provisions by the railroad, a violation that was initially sustained by both the Interstate Commerce Commission and a federal district court (p. 94).

***Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).**

Charles Hamilton Houston, the architect of the NAACP strategy for overcoming the legal “Separate But Equal” doctrine as judicially established by *Plessy v. Ferguson*, argued this case for “Lloyd L. Gaines, an African-American resident” of Missouri, who had been denied “admission to Missouri’s all-white law school” (Hall, 1992, p. 556).<sup>127</sup> The official report of the Court’s opinion, while including the legal arguments by attorneys for Missouri, did not include the legal arguments advanced by Mr. Houston and his associates (pp. 338-342). One can surmise from the opening of the Court’s 6-2 opinion, which was delivered by Chief Justice Hughes, that the “refusal [to admit Gaines on racial grounds] constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution,” was an argument presented by Houston (p. 342).<sup>128</sup> The Court was requested to issue a writ of mandamus “to compel the curators of the University to admit [Gaines]” (p. 342).

At the original state court trial in Missouri, university officials admitted “that [Gaines’] ‘work and credits at the Lincoln University would qualify him for admission to the School of Law of the University of Missouri if he were found otherwise eligible’” (p. 343). According to the Court’s summarization of the facts of the case:

He [Gaines] was refused admission upon the ground that it was “contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri.” It appears that there are schools of law in connection with the state universities of four adjacent States, Kansas, Nebraska, Iowa and Illinois, where nonresident negroes are admitted. (p. 343)

For the Court, the critical legal question was “whether the provision for the legal education in other States of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection” (p. 348). The Court sharpened the focus of the question on the next page of its opinion, stating, “The basic consideration is ... what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color” (p. 349). Immediately prior to examining the facts in light of the legal question, the Court took note of the “duty of the State,” which, according to the Court, was a “duty when it provides such [legal] training to furnish it to the residents of the State upon the basis of an equality of right” (p. 349). The Court summarized its view of the facts as applied to the legal question:

The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination. (pp. 349-350)

It was in conjunction with these arguments that the Court cited *Yick Wo v. Hopkins*. And it was a phrase in the following elaboration of *Yick Wo* [in boldface], which, in turn, was cited by Justice Douglas in his separate concurring opinion in *Bob-Lo Excursion Co. v. Michigan* where he stated, “Nothing short of at least ‘equality of legal right’ in obtaining transportation can satisfy the Equal Protection Clause” (333 U.S. 28, 42). The *Yick Wo* citation and its elaboration by the Court in *Missouri ex rel. Gaines v. Canada* follows:

The equal protection of the laws is “a pledge of the protection of equal laws.” *Yick Wo. v. Hopkins*, 118 U.S. 356, 369. Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the **equality of legal right** must be maintained. That obligation is imposed by the Constitution upon the States... (Emphasis added) (p. 350)

*Yick Wo v. Hopkins* was one of two cases cited by Chief Justice Hughes in consideration of the equal protection arguments before the Court. The other case, *University of Maryland v. Murray*,

169 Md. 478, involved a similar legal matter, admission by “a black Marylander ... and graduate of Amherst College” to the “law school of the University of Maryland” (McNeil, p. 138). That case had been argued previously by Charles Hamilton Houston, but unlike the state courts in Missouri, the lower state court in Maryland “directed the university to admit Murray – in accordance with his constitutional right” (McNeil, p. 139). Six months later, “the Maryland Court of Appeals affirmed the lower court’s writ of mandamus” compelling Donald Murray’s admission to and attendance at the University of Maryland Law School (p. 139).<sup>129</sup>

In its *Missouri ex rel. Gaines v. Canada* decision reversing the ruling of the Missouri Supreme Court that had affirmed the lower state court’s decision upholding the action of the University of Missouri in denying Mr. Gaines admission to its law school, the U.S. Supreme Court announced:

[T]he court denied the federal right which petitioner set up and the question as to the correctness of that decision is before us. We are of the opinion that the ruling was error, and that petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State. (p. 352)

A legal historian summarized both the significance and the immediate aftermath of *Missouri ex rel. Gaines v. Canada*:

The Gaines case thus became a pivotal event in the NAACP’s campaign to overturn the separate but equal standard. While the Court did not repudiate segregation, the case signaled a new urgency in evaluating the standard. As for Lloyd Gaines, he never enrolled in law school. Shortly after the Court rendered its opinion, he disappeared, never to be heard from again. (Hall, 1992, p. 557)

### ***Yick Wo v. Hopkins*, 118 U.S. 356 (1886).**

Since the relationship between *Yick Wo v. Hopkins*, *Missouri ex rel. Gaines v. Canada*, and Justice Douglas’ concurring opinion in *Bob-Lo Excursion Co. v. Michigan* has already been explained on the previous page, this section will focus on providing a short synopsis of the case so the reader can fully ascertain its significance in relation to the issue of equal rights.

First of all, the ruling actually involved two separate cases with almost identical factual and procedural histories, which, being nearly identical, were combined on appeal to the U.S. Supreme Court. Second, the historical context included Chinese laundries in San Francisco, anti-immigration feelings by white Californians, and racist hostility to Chinese people. Third, the procedural progress of the case included a trial before “the Police Judges Court, No. 2, of the city and county of San Francisco, conviction, imprisonment, application “for a writ of *habeas corpus* to the Supreme Court of California” for one party and to the “Circuit Court of the United States for the District of California” for the other party, denial of the applications, and appeals for a writ of error to the Supreme Court (pp. 356-357).<sup>130</sup>



In 1880 the City of San Francisco passed an ordinance requiring all people operating laundries “within the corporate limits of the city and county of San Francisco” to obtain “the consent of the board of supervisors” in order to legally operate a laundry (p. 357). Operating a laundry without such permission was made a misdemeanor with a conviction resulting in a “fine of not more than one thousand dollars, or ... imprisonment in the county jail not more than six months, or by both such fine and imprisonment” (p. 357).

Facts that were “admitted on the record” by both parties included the following: of the approximately 320 laundries, “about 240 were owned and conducted by subjects of China”; and, more than 200 applications by the two plaintiffs and their “countrymen ... for permission to continue their [laundry] business” were denied by the board of supervisors while “all the petitions of those who were not Chinese, with one exception ... were granted” (p. 359). Also, the Court cited the third article of the treaty between the United States and China, which contained the following stipulation:

If Chinese laborers, or Chinese of any other class ... meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty. (pp. 368-369)

The Court, previous to citing the text of the Fourteenth Amendment, declared:

The Fourteenth Amendment to the Constitution is *not confined to the protection of citizens....* These *provisions are universal in their application, to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. (Emphasis added) (p. 369)

The Court noted that San Francisco’s laundry ordinances didn’t “prescribe” any “rule and conditions for the regulation of the use of property for laundry purposes to which all similarly situated [could] conform” (p. 368). Instead, all decisions depend upon “the mere will and pleasure” of the supervisors (p. 368). Applying these facts to the American theory and principles of government, the Court observed:

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. (pp. 369-370)

The Court continued its lesson in American Civics with a lengthy sentence that continued a line of thought running from Aristotle to the Massachusetts Bill of Rights authored by John Adams to Chief Justice Marshall’s use of it in *Marbury v. Madison* (See n. # 67):

But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments ... securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth “may be a government of laws and not of men.” (p. 370)

The Court noted the need to look beyond the literalness of a law and examine its effects:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. (pp. 373-374)

Noting the fact of discrimination against Chinese launderers, the Court declared “that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified” (p. 374). The Court concluded:

The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged. (p. 374)

The contrast between this ruling and the ruling by the *Plessy* Court is enough to make a grown person weep, both for the people who suffered as a result of *Plessy* and for the betrayal of the “American vision for a more perfect society” (Preceding manuscript, p. 31). A legal scholar observed, “Although the *Yick Wo* decision was potentially sweeping, it did not achieve instant recognition. After 1886 the Supreme Court’s composition changed, and the Court did not build upon this precedent until the mid-twentieth century” (Hall, 1992, p. 949).

## Appendix P

### Exchange Between the Supreme Court Justices and Roger Tellinghuisen, Attorney General For South Dakota, During Oral Argument of *South Dakota v. Dole*

Tellinghuisen: I think that it could be suggested that Congress under its commerce clause powers could impose a regulation upon the states which it otherwise could not do in the face of the Twenty-First Amendment [sic].

The Court: I thought you were arguing that these conditions on receipt of Federal money were invalid in themselves.

Tellinghuisen: I am arguing --

The Court: Wholly aside from the Twenty-First Amendment. Don't you argue that?

Tellinghuisen: No, I don't. I suggest in our brief that the conditions are invalid outside the context of the Twenty-First Amendment from the standpoint that they are coercive.

The Court: Well, do you disavow the argument then submitted by the National Conference of State Legislatures in their amicus brief to the effect that there has to be a substantial relationship between the condition imposed on a grant and the spending of Federal money?

Tellinghuisen: Your Honor, I am not in a position to suggest to this Court that I disagree with that proposition.

The Court: Well, you certainly are. You can say it is right or it is wrong.

The Court: You just did a while ago.

Tellinghuisen: What I am suggesting is that I am not prepared to address that issue in light of the fact that we have the Twenty-First Amendment. I think it would be --

The Court: What if you lose on that, and this Court is having to grapple with it? Is that an argument you make or is it not?

Tellinghuisen: It is from the standpoint that Congress's power under the commerce clause is not without limitations, as this Court has noted, for instance, in *Lawrence County v. Lead-Deadwood School District* [sic]. And we would submit to the Court that the Tenth Amendment would operate as a bar upon Congress to impose these types of conditions which in effect are coercive upon the states, and that are being used -- is being attached for a purpose not related to --

The Court: That is the same argument.

The Court: Well, the argument made in that amicus brief is not one of coercion at all. That is not the thrust of it.

Tellinghuisen: The argument that is made in the amicus brief is not that the purpose for which the condition is attached is not proper, and I guess I would just have to maintain that I am not prepared to argue that particular fine point at this time because we are not dealing outside the scope of the Twenty-First Amendment.

The Court: (Inaudible) suggest then, Mr. Attorney General, that the Tenth Amendment at least is not as much of an inhibitor on Federal regulation as would be the Twenty-First?

Tellinghuisen: I think that would certainly be in keeping with this Court's prior decisions.

The Court: And that is your position?

Tellinghuisen: It may not be a position that I would like to advocate, but it is certainly one that I recognize.

The Court: It sounds like if you lost on the Twenty-First then you would a fortiori lose on the Tenth.

Tellinghuisen: Well, I guess I can sum it up, Your Honor, by just suggesting that if we lose on the Twenty-First Amendment I recognize we are in trouble on the Tenth Amendment.

## Appendix Q

### Brief of the National Conference of State Legislatures et al As *Amici Curiae* In Support of Petitioner [State of South Dakota]

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**SUMMARY OF ARGUMENT**

I. Congress may spend for “the general Welfare,” independent of its specific delegated regulatory powers. In exercising its spending power, Congress may also establish conditions relating to its expenditure of funds; but to be valid as conditions, the requirements or prohibitions must relate directly to the grant itself. The court of appeals erred in determining that the NMDA was a valid spending condition imposed by Congress.

The court of appeals improperly concluded that the NMDA did not constitute “coercion” of the States. The Court ignored both the legislative history, which plainly demonstrates that the NMDA is a coercive measure, and the practical dependence of the States on federal highway funds. In any event, the “coercion/inducement” test is not helpful in determining whether a requirement attached to a grant is valid as a condition under the Spending Clause, or is a regulatory enactment that must be supported by the powers specifically delegated to Congress. The coercion/inducement test stems from *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), whose holding upon close analysis, fails to support it. Since *Steward*, the Court has recognized on numerous occasions that there is no constitutionally significant difference between coercing action by withholding a benefit and inducing action by granting a benefit. Either may operate as a coercive measure destructive of fundamental rights.

A more pertinent inquiry is whether the condition relates directly to the purpose of the expenditure to which it is attached, or is, rather, legislation directed to another, distinct federal

purpose. In the latter case, the condition cannot be a valid exercise of the *spending power*, although it may be valid pursuant to one of Congress' expressly delegated regulatory powers (Emphasis in original).

The NMDA bears no direct relationship to the grant of federal funds for the construction and improvement of highways. The amendment does not specify the purpose for which the funds may be spent, does not relate to the highways which are the object of the expenditure, and does not even relate to users of the highway. Instead, its effect is to legislate in an extraneous area by limiting the States' discretion to control the sale and distribution of alcoholic beverages within their borders. That is the effect that Congress intended, as appears clearly from the legislative history. Under these circumstances, the NMDA is not a valid exercise of the *spending power*; and it must be examined to determine whether it is within the scope of Congress' delegated regulatory powers (Emphasis in original).

II. Congress has not power under the Constitution to enact a national minimum drinking age. The State's right to "regulate the sale or use of liquor within its borders" lies with the "core § 2 powers" vested in the States by the Twenty-first Amendment. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984). That Amendment "directly qualifies the federal commerce power" (324 *Liquor Corp. v. Duffy*, No. 84-2022, slip op. 10 (U.S. January 13, 1987)), the only possible source of authority for regulation by Congress of the local sale and consumption of alcoholic beverages. There is no place for a "balancing" test in the area of "the State's central power under the Twenty-first Amendment" to "regulat[e] the times, places, and manner under which liquor may be imported and sold" (*Capital Cities Cable*, 467 U.S. at 716). The history of the Twenty-first Amendment, particularly the elimination of proposed § 3 because it would have

given Congress effective control over local liquor sales, demonstrates beyond doubt that Congress has no power to impose a national minimum drinking age.

Even if the Twenty-first Amendment did not preclude enactment of a national minimum drinking age, Congress has no power to compel the States to adopt laws to achieve that objective. This Court has never “sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations” (*FERC v. Mississippi*, 456 U.S. 742, 761-762 (1982)), but rather has expressed doubt on this point (*id.* At 762, n.26). The constitutional division of powers between the national government and the States precludes Congress from mandating state legislation.

Accordingly, the National Minimum Drinking Age Amendment cannot be sustained, either as an exercise of Congress’ broad spending power or under the regulatory powers delegated to it by the Constitution.

**B. The Validity Of “Conditions” On A Grant Depends Upon Whether They Are Specifications As To The Use Of The Grant Or An Attempted Regulation.**

Rather than the illusory inquiry whether a condition on spending is coercive, the proper inquiry is whether the requirement imposed by Congress is a condition at all, or whether it is in fact a regulation. *Butler* may have approved the “expenditure of public moneys for public purposes” (297 U.S. at 66), without regard to limitations implicit in the direct grants of legislative power, but it did not approve conditions on the expenditure of public moneys that serve regulatory purposes unrelated to the object of the expenditure. Thus, not every spending condition related to the national interest is valid as a lawful exercise of the spending power. The condition must relate to the purpose of the expenditure, not to some other national purpose that



serves the “general Welfare.” Otherwise, it is not a spending condition at all. It is simply regulation, and, as such, valid only if supportable as an exercise of a delegated power other than the spending power.

An example illustrates this point. Suppose that Congress, in the interest of the “general Welfare” in enhanced science education, determines to provide grants to the States to build schools. Congress may attach to those grants the requirement that those schools contain science laboratories. Congress may not, however, require that all other state schools have science laboratories because that requirement does not relate to the proper expenditure of the federal funds. It does relate to the national interest in science education; but because it does not relate to the purpose of the grant, it is regulation, not an exercise of the spending power. It may be valid as regulation, or it may not be; but it is not a lawful exercise of power under the Spending Clause. Although Congress has the power to *spend* for the general welfare, it has the power to *legislate* only for delegated purposes (Emphasis in original). The distinction is crucial if any semblance of a federal government of limited powers is to be preserved.

The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress’ intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress’ delegated regulatory powers.

The will of the people as embodied in the Constitution grants to Congress only specific delegated powers. All powers not so delegated are expressly reserved to the States and to their

people. Federal regulation, even though disguised as a spending condition, that exceeds Congress' delegated regulatory powers, threatens "the separate and independent existence" of the States. *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869).

All of this is not to say that the Court must invalidate a purported condition on a grant that is found to be a regulation. As a regulation, the condition would be valid if it fell within one of Congress' delegated regulatory powers.<sup>32</sup> A test that inquires whether the federal requirement is a condition at all, *i.e.*, a specification as to the use of grant funds, rather than a regulation, need not call into question any decision of this Court.<sup>33</sup> It will merely ensure that the decision in this case and others in the future will reflect the constitutionally imposed limits on Congress' authority.

**C. The National Minimum Drinking Age Amendment Is Not A Condition On the Expenditure of Federal funds, But An Attempted Regulation.**

At issue in this case is the requirement that States enact a minimum drinking age as a condition on the grant of highway funds. Its validity thus depends on whether the adoption of a minimum drinking age is a necessary and proper condition to effectuate Congress' purpose in providing funds to the States for highway construction, not to effectuate some other national purpose, no matter how laudable.

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<sup>32</sup> It is well settled that legislation invalidly enacted under one of Congress' powers will be upheld if valid under another. See *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); *United States v. Butler*, 297 U.S. at 61.

<sup>33</sup> Thus, in the earliest spending condition cases, *Butler* and *Steward*, the "condition" could have been sustained as regulation under the Commerce Clause. Much of the confusion in the early spending and taxing cases no doubt resulted from what is now seen as an overly narrow view of the commerce power. Compare *Hammer v. Dagenhart*, 247 U.S. 251 (1918), with *United States v. Darby*, 312 U.S. 100 (1941). Thus, we do not urge, as the Solicitor General characterizes petitioner's argument (Op. Cert. 10), that "any condition attached to a legislative grant of funds would be unconstitutional unless it were independently supported by some clause of the Constitution other than the Spending Clause." We argue simply that requirements that are *not* "spending" conditions must be independently supported.

There is no dispute that Congress, pursuant to its spending power, may grant funds to the States to build and maintain highways. Nor is there any dispute that Congress may impose specifications necessary to effectuate its intent in spending for those highways, by dictating, for example, that the highway shall be built in a certain location, or according to a certain construction design, or that it shall have special lanes designated for use by high occupancy vehicles, or shall not be used by vehicles over a certain weight. Such conditions, which relate either to the construction of the highway or to its use, may be necessary to accomplish the purpose of the grant itself. They are lawful specifications on the use of the federal funds provided; and they are valid for the same reasons that Congress may spend money for health care and specify that none of that money may be spent on abortions (*see Harris v. McRae*, 448 U.S. 297 (1980)), or spend money on local public works projects and specify that a percentage of the funds must be allocated to minority contractors (*see Fullilove v. Klutznick*, 448 U.S. 448 (1980)). As the purchaser of a highway, Congress is entitled to specify, just like any other purchaser, precisely the kind of highway that it wants. What Congress may not do pursuant to its spending power is to impose requirements on a grant that go beyond specifying how the money should be spent. Those requirements are not conditions at all; they are regulation. In the name of the general welfare, Congress may spend for anything that it wishes; but it cannot buy compliance with unrelated legislation that is not otherwise within its delegated regulatory powers.

That, however, is precisely what Congress attempted to do when it added the NMDA to the Surface Transportation Assistance Act. The purpose of Title I of that Act was to provide funds to complete, and to resurface, restore, rehabilitate, and reconstruct the Interstate System, and to fund system-related projects. See H.R. Rep. No. 555, 97th Cong. 2d Sess. 2-3 (1982), *reprinted in* 4 U.S. Code Cong. & Ad. News 3639, 3640-41 (1982). The purpose of the NMDA,

as identified by the court below and set out clearly in the legislative history, was to prevent teenage highway deaths attributable to drunk driving, particularly when teenagers drive across state lines to drink. Preventing teenage highway deaths is obviously an important goal; South Dakota and other States are themselves pursuing it by various means (see n. 11, *supra*). A national minimum drinking age of twenty-one may aid in effectuating this goal. But a national minimum drinking age is not related to Congress' intent in expending funds for the construction and maintenance of national highways.

The NMDA does not specify anything concerning the nature of the highways for which Congress wishes to spend federal funds.<sup>39</sup> Instead, the amendment uses the States' need for federal highway dollars to accomplish an unrelated regulatory purpose. The court below upheld the amendment on the ground that it furthered an important national purpose, the elimination of drunk driving by young adults. On that theory, the condition would have been equally related to any other federal expenditure, such as the hypothetical grant of funds to the States for science education.

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<sup>39</sup> It cannot reasonably be argued that Congress wished to spend its funds on a "safe" highway, defined to be a highway free of drunk drivers. The NMDA was attached not to the grant of safety funds, but to general highway construction funds. See, *e.g.*, S8206 (remarks of Sen. Danforth); see also H5395 (remarks of Rep. Howard); H5398 (remarks of Rep. Florio). Moreover, the condition was imposed after the grants for the highways were made and the States took advantage of the unrestricted federal aid to build highways, the use of which Congress now seeks to control. The condition is also at once so overbroad and underinclusive that it plainly does not accomplish even the goal of safe highways. The NMDA requires the States to prohibit the purchase of alcohol by all persons younger than 21, whether or not they ever drive; and it does nothing about the drivers older than 21, who account for 84% of the accidents (see n. 15, *supra*). It is apparent that the goal of uniformity, in which Senator Danforth, a sponsor of the bill, stated that Congress was "more interested than the precise age" (S8219), would have been served as well by requiring all States to lower the drinking age to 18, while the problem of youthful drivers would have been better served by raising the driving age.

Moreover, unlike true spending conditions, which merely specify the permissible uses of federal funds, the congressional purpose of establishing a uniform minimum drinking age cannot be accomplished unless all the States take the grants and comply with the condition. The decision by even a single State to forgo the federal funds in order to avoid compliance would thwart the regulatory end. The dependence on uniformity is the hallmark of regulation, not grant conditions.<sup>40</sup> The court of appeals held that withholding highway funds pending the adoption of a minimum drinking age is “reasonably related to Congress’s interest in achieving a nationally uniform minimum drinking age.” Pet. App. A13. This tautology, however, has no bearing on the issue whether the condition is reasonably related to the grant to which it is attached. The court of appeals’ syllogism – that Congress could have concluded that drinking and driving by young adults was a problem of national proportions; that a uniform minimum drinking age would lessen that problem; and that the grant condition was therefore reasonably related to solution of the national problem – is a fine description of support for the exercise of the regulatory power. It has nothing to do with the exercise of the spending power.

The error of the court of appeals’ analysis is patent. If the courts uphold grant conditions that are not specifications for the grant itself, but are simply, in some way, “in the general welfare,” Congress assumes license to regulate for the general welfare, *i.e.*, without regard to the limitations inherent in the grant of specific delegated regulatory powers. As we discuss below, the NNMDA is not within those powers.

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<sup>40</sup> Ironically, in the absence of uniformity, a State that does comply might suffer *increased* teenage deaths due to drunk driving. If two adjacent States set the drinking age below 21, and one raises the drinking age because it cannot afford to forgo the federal highway funds, it might for the first time see its youths create “blood borders” by drinking in the adjacent State, whereas it previously kept them close to home.

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## Appendix R

### The Concept of Universal Rights: Its Historical Development and Implementation

#### Overview

The Declaration of Independence, passed and signed by the Second Continental Congress on July 4, 1776, can be viewed as the world's first political document adopted by either a national or an international governmental body which declared universal rights for all men, regardless of birth or circumstance. The second paragraph of the U.S. Declaration of Independence states:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed... (Declaration of Independence)

It would be incorrect to view Magna Carta as a political document guaranteeing individual liberties to all men. In Magna Carta, King John granted certain rights to the English aristocracy. Magna Carta's importance lies in the fact that it was the first political document to place a ruling monarch under the rule of law and to act as a check on royal power on June 15, 1215, the date on which King John agreed to the terms of Magna Carta (Willson, pp. 108-109). Magna Carta was solidified by the Declaration of Rights enacted by Parliament on December 16, 1689, following the Glorious Revolution that deposed the Catholic King James. The terms of the English Declaration of Rights were described as "a reaffirmation of those 'true, ancient and indubitable rights of the people of this realm'" (Friedrich & Blitzer, p. 145). Those rights included:

(1) making or suspending any law without the consent of Parliament is illegal, (2) levying money without consent of Parliament is illegal, (3) the maintenance of a standing army without the consent of Parliament is illegal,

(4) it is lawful to petition the sovereign, (5) it is lawful for citizens to keep arms, (6) elections of members of Parliament must be free, (7) there must be freedom of debate in Parliament, (8) excessive bail should never be demanded, (9) juries should be empaneled in every trial, and (10) Parliament should meet frequently. (Friedrich & Blitzer, p. 145)

The English Declaration of Rights continued the trend begun by Magna Carta which reflected the idea that governments should be subjected to the rule of law, in this case the monarchy.

The Declaration of the Rights of Man and the Citizen, enacted by the revolutionary National Assembly in France following the fall of the Bastille on July 14, 1789, can be viewed as the world's second political document adopted by a governmental body that declared universal rights for all men. The National Assembly had been created by the withdrawal of the Third Estate from the previous Estates General on June 17, 1789. Upon their withdrawal, the Third Estate renamed themselves and whoever would join them "the National Assembly." These actions amounted "to a constitutional revolution, for now the elected deputies of 'the nation' displaced the old estates in which nobles and clergy dominated" (Censer & Hunt, p. 50). The actions taken by the Third Estate received the sanction of King Louis XVI on June 27 when he ordered the members of the First and Second Estates (clergy & nobles) "to join the deputies of the Third Estate for deliberations in common" (Censer & Hunt, p. 51). Subsequently the National Assembly voted to approve the Declaration of the Rights of Man and the Citizen on August 26, 1789. This action had been delayed for a week because of "clerical reluctance to concede total freedom of thought and worship" (Doyle, p. 118). The first and second articles of the Declaration of the Rights of Man and the Citizen declared:

1. Men are born and remain free and equal in rights. Social distinctions may be based only on common utility.
2. The purpose of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression. (Censer & Hunt, p. 46)



Just who was considered to be a man depended upon the sociopolitical norms of particular political societies. In revolutionary America, “men” were deemed to be white males who owned property. In revolutionary France, “men” were initially interpreted to be white Catholic males “who passed a test of wealth” (Censer & Hunt, p. 55). However, in December 1789 the National Assembly determined “that the Declaration applied to Protestants” as well (Censer & Hunt, p. 55). In September 1791 the National Assembly included Jews in the definition of “citizens if they were willing to renounce their special tax and legal exemptions” (Censer & Hunt, p. 55). Thus, during this period in French history, “about two-thirds of adult French men met the property requirement for voting under the new system” (Censer & Hunt, p. 56). Note that in both revolutionary America and revolutionary France, women were not deemed equal enough to vote.

### **Full Citizenship and Voting Rights for Women**

The right to vote for women came over a century later in both America and France. The delay in the United States occurred partly because the development of organized political activism for women’s suffrage didn’t appear on the scene until 1848 when Elizabeth Cady Stanton and Lucretia Mott called for a conference to meet in Seneca Falls, New York, to address the issue of women’s rights following the refusal of a world anti-slavery convention in London to let Mott speak even though she was officially a delegate to the conference (Modern History Sourcebook: Seneca Falls: The Declaration of Sentiments, 1848). Modeling their Declaration of Sentiments on the U.S. Declaration of Independence, the document approved by the Seneca Falls Conference declared:

We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the

consent of the governed. (Stanton, p. 70; see also Beard, Beard & Beard, p. 210)

Illustrative of the adaptive work needed to change values, beliefs, and attitudes about women being recognized as full citizens and the length of time required for adaptive work to have an impact upon society, the delay in the United States also occurred in spite of the passage and adoption of the Fourteenth Amendment in the aftermath of the Civil War in 1868. Section I of the Fourteenth Amendment clearly stated:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...

Section 2 of the Fourteenth Amendment muddled the waters somewhat regarding gender. While it didn't define citizenship in terms of the voter's gender, it did provide a penalty only when an eligible male was denied the right to vote. According to Section 2:

But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the *male* inhabitants of such State, *being twenty-one years of age*, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such *male* citizens shall bear to the whole number of male citizens *twenty-one years of age* in such State.

It took only seven years from the time the Fourteenth Amendment was officially adopted in 1868 until a case reached the U.S. Supreme Court on the issue of women's voting rights. *Minor v. Happersett*, 88 U.S. 162 (1875) reached the U.S. Supreme Court by basing its argument for women's suffrage on the Fourteenth Amendment (See previous pp. 131-136 of this document). Ms. Minor, a resident of Missouri, was denied the right to register to vote by Happersett, the voter registrar, because "she was not a 'male citizen of the United States,' but a

woman” (88 U.S. 162, 163-164). The Court denied Minor’s claim that Happersett’s action violated the Fourteenth Amendment by holding that citizenship didn’t include the right of suffrage. While such reasoning wouldn’t have prevailed in ancient Athens (B.C.E.) where citizenship entitled one to both speak and vote on public issues, it prevailed two millennia later in nineteenth-century America (C.E.). While Athens restricted citizenship to “freeborn males,” the issue being confronted was citizenship and what it meant (Stone, 1988, p. 10). According to the ancient Greeks:

Every citizen had the right to vote and speak in the assembly where the laws were enacted, and to sit in the jury courts where those laws were applied and interpreted. These were the basic characteristics of Greek *politics* – the administration of its cities – long before Aristotle described them in the fourth century B.C. [sic]. (Emphasis in original) (Stone, 1988, p. 11)

In addressing the issue of citizenship, however, the nineteenth-century U.S. Supreme Court elected to discard several centuries of political discourse flowing from Greek thought and chose to re-define citizenship. According to the Court’s restricted definition in *Minor v. Happersett*, citizenship merely conveyed “the idea of membership of a nation, and nothing more” (88 U.S. 162, 166). Reasoning that citizenship and suffrage were separate entities, the Court ruled that “the fourteenth amendment [sic] did not affect the citizenship of women any more than it did of men” (88 U.S. 162, 170).

As a result, American women were not accorded the right to vote until 1920 when the Nineteenth Amendment to the Constitution was approved (Monk, p. 238). That same year Icelandic women were accorded full suffrage (See Appendix R1). Thus the country that created the world’s first parliament in 930 C.E. and the nation that created the first governmental declaration of universal rights for all men in 1776 C.E. recognized women as citizens with voting rights in the same year (Davis, p. 19). In so doing, they became the 16th and 17th nations

worldwide to recognize the legal voting rights of women, which was approximately three decades after New Zealand became the world's first nation to officially recognize the right of women to vote (See Appendix R1). At the time the Nineteenth Amendment was passed, 16 states and one territory of the U.S. had already enacted legislation giving women in their states full suffrage, 11 states granted presidential suffrage, two states allowed women to vote in primary elections, and 19 states completely denied women the right to vote in any election (See Appendix R1). Prior to the Nineteenth Amendment being officially approved by Congress on June 4, 1919, to be submitted for ratification to the states and its subsequent approval by the 36th state for official ratification on August 18, 1920, "[a]mendments giving women the right to vote were introduced in Congress one after another for more than 40 years before this one [the Nineteenth] was finally passed" (Peltason, pp. 798r-798s). The Nineteenth Amendment stated simply and clearly that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

French women were not recognized as voting citizens until 1944 when the provisional government headed by De Gaulle recognized the right of women to vote following the liberation of Paris from Nazi occupation (Censer & Hunt, p. 55; Hackett et al, p. 404l). A modern-day commentator noted the long delay in French women being accorded the vote in spite of their "active participation in the French Revolution, the French Republic of 1848, [and the 1871 Paris Commune]" (Eraslan, p. 1). Contrasting women's suffrage in France with that achieved in the United States, Eraslan pointed out "that women's suffrage could only be achieved in France thanks to a wartime decree by General Charles de Gaulle, not by the initiative of the legislators of the parliamentary republic" (Eraslan, pp. 1-2). Moreover, "[A]mong the major European countries France was one of the last to grant women the vote" (Eraslan, p. 2). Citing a source that

focused on the 1848 Revolution in France, Eraslan noted an oppositional irony in men's attitudes:

Ironically, leftist politicians were concerned that women could vote for conservatives whereas the Roman Catholic Church were opposing universal suffrage as its leaders feared that voting would emancipate women and cause the breakup of the family. (Eraslan, p. 1)

French women went to the polls for the first time in October, 1945, to elect the National Assembly that would write the new French constitution for the Fourth Republic, an event that finally fulfilled expectations created by the Declaration of the Rights of Man and Citizen (Hackett et al, p. 4041). The promise of the French Revolution, "Liberté, Egalité, Fraternité," and the possibility of its extension into the political lives of women had been cut short by a combination of the cultural revolutionary phase of the Reign of Terror's effort to exert total control and force conformity to a revolutionary standard of behavior and by the rise of Napoleon to power as part of a conservative response to the Revolution. The deputies of the National Convention under Robespierre's influence began to crack down on "women's political clubs, in particular the society of Revolutionary Republican Women. The deputies associated women's participation in the public sphere with political disorder and social upheaval" (Censer & Hunt, p. 101). One of the leading deputies of the National Convention, Jean-Baptiste Amar, "proposed an official decree on 30 October 1793 forbidding women to join together in political clubs" (Censer & Hunt, p. 82). To justify such action, Amar posed what he viewed to be the critical issue and then articulated his own answer about women's capabilities:

Should women exercise political rights and get mixed up in the affairs of government? Governing is ruling public affairs by laws whose making demands extended knowledge, an application and devotion without limit, a severe impassiveness and abnegation of self; governing is ceaselessly directing and rectifying the action of constituted authorities. Are women capable of these required attentions and qualities? We can respond in general no.... (Censer & Hunt, pp. 82-83)

In the view of two historians:

The closing of women's clubs marked an important turning point in the Revolution. From then on the ... political organizations came increasingly under the thumb of the Committee of Public Safety and the Jacobins in the Convention. (Censer & Hunt, p. 101)

Napoleon's views of the place of women in society did not differ from the sentiments of the revolutionary deputies of the National Convention. According to two professors specializing in French history, Napoleon:

effectively ended the French Revolution and set France on a new course. Step by step he created an authoritarian state: military officers, engineers, and scientists took most of the honors; the police maintained order through censorship, harassment, and house arrest; and a paternalistic legal code buttressed the authority of fathers over children, husbands over wives, and employers over workers. (Censer & Hunt, p. 144)

The "paternalistic legal code" referred to in the just-quoted passage was better known as the Napoleonic Code and took legal effect in 1804 (Censer & Hunt, p. 144; Cleary, p. 604).

Although the new law code "guaranteed religious liberty and established a uniform system of law that ensured equal treatment for all adult males," it also curtailed women's rights by making women subject either to their fathers or to their husbands (Censer & Hunt, p. 147). As discussed by a leading French jurist of the time:

There have been many discussions on the equality and superiority of the sexes. Nothing is more useless than such disputes.... Women need protection because they are weaker; men are free because they are stronger. (Censer & Hunt, p. 147)

Professors Censer and Hunt summarized the Napoleonic Code framer's attitude towards women:

"[T]hey used women's supposed innate weakness as justification for limiting the participation of women in public life and for legally protecting their separate, domestic roles to help reaffirm their wifely and motherly virtues" (Censer & Hunt, p. 147). According to Censer & Hunt's

comparative analysis of women's rights under the French monarchy, the French Revolution, and the Napoleonic Code:

The Civil Code took the male revolutionary ambivalence about women's political participation a step further, modifying even those few revolutionary laws that had been favorable to women, and in some instances denying rights women had under the monarchy. (Censer & Hunt, p. 147)

The values and beliefs of the framers of the Napoleonic Code were more attuned to the views of Enlightenment writers, particularly Rousseau, "who insisted that natural law and reason demonstrated that men inherently possessed the right to political participation whereas women did not. Nature and reason justified the exclusion of women from the republic" (Censer & Hunt, p. 185). The impact of the conservative Napoleonic reaction on the original ideals of the French Revolution was long-lasting as it spanned a century-and-a-half of time. "Not until 1965 did French wives gain legal status equal to that of their husbands" (Censer & Hunt, p. 147).<sup>131</sup>

### **Citizenship and Voting Rights for American Indians**

#### **Introduction.**

American Indians received U.S. citizenship and voting rights through a tangled, complicated, piecemeal process involving a combination of U.S. Supreme Court rulings and congressional legislation. It was tangled and complicated because of the different views regarding the status of the Indian tribes and of tribal members that flowed from their treaty status and because of the constantly shifting political status of individual tribes vis-à-vis the United States. Citizenship and, by extension, voting rights for tribal members, were inextricably intertwined with the political status of tribes and the respective sovereignty of tribal governments. As part of a nonlinear circular process the political status of tribes, in turn, was impacted by congressional legislation and by Court rulings regarding the legitimacy of congressional action. Finally, the assumptions, beliefs, and values of the dominant Europeans

and Euro-Americans added yet another ingredient to the social, economic, and political mix of impacting factors. Treaties, Supreme Court rulings, and congressional action, out of which eventually flowed citizenship and voting rights for tribal members, were all grounded in a worldview that took for granted the following assumptions: white superiority and nonwhite inferiority regarding the worth and ability of individuals, the superiority of western civilization and the corresponding inferiority of all other civilizations, and, finally, the superiority of agricultural-based societies compared with the inferiority of hunter/gatherer-based societies. Each of these factors will be discussed subsequently in order to trace the twisting, turning route whereby tribal members of the various Indian nations, situated in what eventually became the United States, eventually received U.S. citizenship and the right to vote.

#### **Treaties as foreign relations.**

From the beginnings of contacts between Europeans and the Indian tribes located between the Atlantic seaboard and the Mississippi River, from the Gulf of Mexico to the Great Lakes-St. Lawrence River region, the tribes were treated as foreign nations. The various European governments negotiated treaties with the tribal governments and treated the tribes as nations to be dealt with as a part of their foreign policy. As a result many tribes located east of the Mississippi possessed treaties with multiple European governments that had been negotiated during the 17th, 18th, and 19th centuries. For example the Meskwaki currently possess treaties and agreements (both written and oral) that the tribe negotiated with the French, the English, the Spanish, and the American governments (Cole, pp. 16-19; Eby, p. 40; Edmunds & Peyser, pp. 202-204; Jung, pp. 13, 15, 18; Wanatee, p. 78; Waseskuk, pp. 56-57).

As the Europeans treated the Indian tribes, so did the fledgling American government. America's first treaty as a newborn nation was not a treaty with a European nation. America's



first treaty following its Declaration of Independence and its birth as the newly formed United States of America was the treaty it negotiated with the Delaware, an Indian nation. The treaty, signed at Fort Pitt on September 17, 1778, contained provisions permitting American troops to pass through Delaware territory “to attack the British posts on the Great Lakes” as well as a provision encouraging Delaware warriors to enlist in the Continental Army (Debo, pp. 86-87). The most interesting provision of the treaty promoting an alliance between the Delaware Nation and the United States for current students of American government, however, was the article tendering the possibility of statehood to the “Delaware Nation” with the resulting guarantee of having “a representative in Congress” (Debo, p. 87). The idea of statehood and representation in Congress implied the right to vote; however, the treaty provision remained stillborn as the Delaware preferred to maintain their own sovereignty. Never again did the United States make such an offer to the Delaware or to any of the other indigenous nations inhabiting the continent. In fact, the next treaty between the United States and the Delaware proved more typical of subsequent treaties between the various tribes and the newly emerged country. According to the Treaty of Fort McIntosh, signed on January 21, 1785, the Delaware “were allotted a reservation of land and ceded to the United States other lands formerly claimed by them” (Prucha, 1984, 1986, p. 34).

The two treaties between the U.S. and the Delaware Nation occurred when the United States was operating under the Articles of Confederation. Thus, either Congress as a whole performed both legislative and executive functions regarding “peace and war,” “sending and receiving ambassadors,” and “entering into treaties and alliances,” or the appointed Committee of the States performed executive and legislative functions while congress was in recess (Article IX, Articles of Confederation). This changed with the adoption of the Constitution which

separated executive and legislative functions. Soon after the current Constitution was ratified by the necessary states, the question arose of how to handle treaties with the Indian tribes. Should treaties with the Indian nations be ratified by the Senate as required by Article II, § 2, ¶ 2 of the Constitution, or was formal ratification not necessary since the negotiating and signing process could be considered sufficient for treaties between the United States and the various tribes?

President Washington submitted the first Indian treaties under the Constitution to the Senate on May 25, 1789, whereupon the Senate, “for the first time, entered upon executive business” (Gales, p. 40). The *Journal of the Executive Proceedings of the Senate of the United States of America* provided more detailed information than did Gales’ *The Debates and Proceedings in the Congress of the United States*. According to the Senate’s *Journal* of its executive proceedings, “General Knox brought the following message from the President, which he delivered into the hands of the Vice-President, and withdrew” (Senate of the United States, p. 3; hereafter cited as Sen. Exec. J.). The papers delivered by Knox as Secretary of War contained a brief introductory message from President Washington and a more detailed report by Secretary Knox. The treaties submitted by the President via Secretary Knox to the Senate for its “consideration and advice” had been negotiated and signed at Fort Harmar on January 9, 1789 by “the United States and several nations of Indians” (Sen. Exec. J., p. 3). One of the two treaties had been negotiated with the Iroquois, referred to as “the Six Nations, the Mohawks excepted,” while the other treaty was with “the Sachems and Warriors of the Wyandot, Delaware, Ottawa, Chippawa [sic], Pattiwatima [sic], and Sac nations” (Sen. Exec. J., p. 5).

In his report to the Senate, Secretary Knox observed that the treaty with the Six Nations had reserved “six miles square round the Fort at Oswego” to the Iroquois (Sen. Exec. J., p. 5). Knox pointed out that the reserved land was currently located “within the territory of the State of

New York” (Sen. Exec. J., p. 5). In order to conform to the requirements of the Constitution, Knox suggested that “if this explanation should be made, and the Senate of the United States should concur in their approbation of the said treaties, it might be proper that the same should be ratified and published” (Sen. Exec. J., p. 5). In other words, according to Knox’s thinking, without treaty status, the authority of the federal government to treat with the Indian tribes regarding state lands could be called into question. The Senate tabled “the message from the President, with the papers accompanying the same ... for consideration” (Sen. Exec. J., p. 5).

The Senate next took up consideration of the “President’s message of the 25th ult.” On Friday, June 12th after moving into executive session (Gales, p. 47). After reading the materials submitted previously, the Senate referred the matter “to a committee, consisting of Messrs. Few, Read, and Henry” (Gales, p. 47). It would be slightly more than two months before the Senate considered the matter of the two Indian treaties. According to a scholar who analyzed the process:

The circumstances in which this decision [of how treaties with Indian tribes should be handled] was reached reveal how both the President and the Senate were feeling their way carefully and thoughtfully in the determination of the technique of treaty-making. (Hayden, p. 12)

Finally, on Wednesday, August 26, 1879, the Senate moved into executive session in order “to consider the report of a committee, appointed June the 10th, on Indian treaties made at Fort Harmar” (Sen. Exec. J., p. 24). The committee of Senators Few, Read, and Henry reported that since the treaties had been made in accord with the “powers and instructions ... given to the said Governor by the late Congress,” they recommended that the treaties “be accepted; and that the President of the United States be advised to execute and enjoin an observance of the same,” whereupon the Senate “[o]rdered, That the consideration thereof be postponed” (Sen. Exec. J., p. 24). At this point it appeared as if the Senate felt it more important “to determine whether the

treaties referred to it were in accord with the instructions under which they were negotiated” rather than consider the question of whether formal ratification would be required (Hayden, p. 13). The Senate would not meet again in executive session until Tuesday, September 8th.

On September 8, 1789, the Senate approved part of the committee’s recommendation, adopting a resolution advising the President “to execute and enjoin an observance of the treaty” with “the Wyandot, Delaware, Ottawa, Chippewa, Pattawattima [sic], and Sac nations” (Sen. Exec. J., p. 25). No mention was made of either ratification by the Senate or the Treaty with the Six Nations. The Senate also reported that “an attested copy of the proceedings was laid before the President of the United States. (Sen. Exec. J., p. 25).

Shortly thereafter, the President having received a copy of the Senate’s resolution regarding one of the two treaties negotiated and signed at Fort Harmar, Secretary of War Knox delivered a second message to the Senate from President Washington. In his message of September 17, 1789, President Washington first observed that it was

the general understanding and practice of nations, as a check on the mistakes and indiscretions of Ministers or Commissioners, not to consider any treaty ... as final and conclusive, until ratified by the ... government from whom they derive their powers. (Sen. Exec. J., pp. 26-27)

After noting that the United States had decided to follow this practice regarding “treaties with European nations,”<sup>132</sup> the President expressed his own opinion by stating, “I am inclined to think it would be adviseable [sic] to observe it in the conduct of our treaties with the Indians” (Sen. Exec. J., p. 27). Observing that even though the Indian nations did not have to submit a treaty negotiated by them to any of their own government bodies for ratification, Washington thought It “both prudent and reasonable” that such a treaty “not be binding on the nation [the U.S.] until approved and ratified by the government” (Sen. Exec. J., p. 27). Instead of creating different classifications of treaties according to how the government treated them after they had been

negotiated, President Washington thought that the “national proceedings [regarding treaties should] become uniform, and be directed by fixed and stable principles” (Sen. Exec. J., p. 27).

Washington then observed that the Senate’s action regarding the Fort Harmar treaties raised two questions:

1st, Whether those treaties were to be considered as perfected, and consequently as obligatory, without being ratified? If not, then 2dly, Whether both, or either, and which of them, ought to be ratified? On these questions I request your opinion and advice. (Sen. Exec. J., p. 27)

The questions were critical (as will be shown through examination of the Marshall Court’s ruling in the Cherokee cases) because of two factors: first, the ability to negotiate a treaty with another power was recognized as an act of sovereignty; and second, the United States would later claim judicial legitimacy to its land holdings in North America by asserting that the United States was the sole and legitimate successor to all of Great Britain’s practices and accomplishments (including negotiating treaties with the various tribes) regarding the various Indian nations.

Realizing that a precedent under the newly adopted Constitution was being established, the Senate appointed yet another special three-person committee (Senators Carroll, King, and Read) to investigate the issues involved and to recommend which course of action should be taken with Indian treaties (Sen. Exec. J., p. 27).

In its report to the Senate on the following day (Friday, September 18), the committee drew a distinction between treaties with Indians and treaties with European nations. The committee concluded that the solemnities of formal treaty ratification were not necessary with Indian treaties (Sen. Exec. J., pp. 27-28). The Senate then postponed action on the committee’s report (Sen. Exec. J., p. 28).

Taking up the matter again on the following Tuesday, September 22, 1789, the Senate, after debating the committee report, rejected the committee’s recommendation and approved a

resolution ratifying only the Fort Harmar treaty negotiated with the Wyandot, Delaware, Ottawa, Chippewa, Potawatomi, and Sac “nations” (Sen. Exec. J., p. 28). The Senate postponed action on the Fort Harmar treaty negotiated with the Iroquois “until next session of Senate” because the treaty could “be construed to prejudice the claims of the States of Massachusetts and New York” (Sen. Exec. J., p. 28). Despite two committee reports recommending the contrary position, through a “process of give and take” between the congressional and executive branches of government over the course of a four-month period, the full Senate agreed with President Washington that treaties with the Indian nations should be accorded the same treatment as treaties with other nations of the world in accordance with the Constitution’s provisions as outlined in Article II, § 2, ¶ 2 (Hayden, p. 16).

### **Status of tribal governments In the framework of american government.**

The legal question regarding the status of Indian tribes and their members – were they foreigners as members of independent & sovereign nations, or were they conquered peoples, the tribes having no recognized governmental status with tribal members viewed as citizens of the states in which they resided – was initially answered in two Supreme Court rulings (*Cherokee Nation v. Georgia* and *Worcester v. Georgia*) that are collectively known as the Cherokee Cases.

### ***Cherokee Nation v. Georgia, 30 U.S. 1 (1831).***

The earliest judicial answer occurred in somewhat ambivalent form in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). The case was precipitated by the discovery of gold on Cherokee land in Georgia and the ensuing illegal occupation of Cherokee land by gold-seeking whites in violation of numerous treaties between the Cherokee and the United States. Georgia subsequently passed “a series of savage laws against the Cherokees” (Debo, p. 121). The state laws enacted by Georgia against the Cherokee included the following:

forbidding their judicial officials to hold court or their council to meet except to ratify land cessions, forbidding them to mine their own gold, authorizing a survey of their land and its disposal by lottery to Georgians, and creating the Georgia Guard to enforce state law in their country. Legislation against the missionaries [to the Cherokees] required white men living among the Indians to swear allegiance to the state under pain of four years' imprisonment for noncompliance. (Debo, p. 121)

As documented by Debo, President Jackson played a duplicitous role in the affair. "In communications to the Georgia officials, the President encouraged their anti-Cherokee policy; to the Indians he argued that he was powerless to prevent the operation of state law" (Debo, p. 121). The actions of the Georgia Guard paralleled that of Nazi thugs some 100 years later under Hitler's Third Reich. Debo described the Georgia Guard and its activities: "The Georgia Guard was composed of ruffians, who terrorized the Cherokees – putting them in chains, tying them to trees and whipping them, throwing them into filthy jails" (Debo, p. 121).

The Cherokees obtained the services of William Wirt, formerly the U.S. Attorney General, and filed suit against Georgia in the U.S. Supreme Court seeking an injunction to halt Georgia's encroachment on Cherokee land and to prevent the operation of Georgia's laws on tribal members and tribal government. As described by an eminent scholar of Indian affairs:

Wirt contended that the Cherokees were a sovereign nation, not subject to Georgia's territorial jurisdiction, and that the laws of Georgia were null and void because they were repugnant to treaties between the United States and the Cherokees, to the intercourse law of 1802, and to the Constitution by impairing contracts arising from the treaties and by assuming powers in Indian affairs that belonged exclusively to the federal government. (Prucha, 1984, 1986, p. 75)

Addressing the issues raised before the Court in *Cherokee Nation v. Georgia*, Justices Thompson and Story opined that "Indian tribes were foreign nations" (Janson, 1978, p. 29). Acknowledging the treaty relationship between the Cherokees and the United States, Justice Thompson (with the concurrence of Justice Story; see 30 U.S. 1, 80) observed that the weaker party of the treaty

placed “itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty” (30 U.S. 1, 53). Justice Thompson continued:

Tributory and feudatory states do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority is left in the administration of the state. Testing the character and condition of the Cherokee Indians by these rules, it is not perceived how it is possible to escape the conclusion, that they form a sovereign state. They have always been dealt with as such by the government of the United States; both before and since the adoption of the present constitution. (30 U.S. 1, 53)

Chief Justice Marshall and the two remaining justices constituting the Court’s majority ruled that the Cherokee were not a foreign state nor were they a state of the United States nor were tribal members considered to be citizens of the United States (Janson, 1978, p. 30). While admitting that the Cherokee Nation had “been uniformly treated as a State from the settlement of our country,” and while acknowledging that the Cherokees’ attorneys had been successful in arguing that Cherokees were members of “a distinct political society capable of managing its own affairs and governing itself,” Chief Justice Marshall framed the critical question: “Do the Cherokees constitute a *foreign* state in the sense of the Constitution” (Emphasis added) (30 U.S. 1, 16)? The question was crucial because if the Cherokee Nation was adjudged to be a foreign state, its law suit against the State of Georgia could be allowed under Article III, § 2 of the Constitution which “describes the extent of judicial power” of the United States (30 U.S. 1, 15).

Article III, § 2, ¶ 1 of the U.S. Constitution reads:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; ... to controversies ... between a State, or the citizens thereof, and foreign States, citizens or subjects. (U.S. Constitution)

Thus, if not a foreign state, the Cherokee Nation’s motion for an injunction against the State of Georgia to stop the operation of state law on Cherokee land would have to be dismissed.



Searching for an answer to whether or not the Cherokee Nation was a foreign state in a constitutional sense, Chief Justice Marshall turned to Article I, § 8, ¶ 3, which gave Congress the power “to ‘regulate commerce with foreign nations, and among the several States, and with the Indian tribes’” (30 U.S. 1, 18). According to the Chief Justice:

In this clause they are as clearly contradistinguished by a name appropriate to themselves from foreign nations as from the several States composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. (30 U.S. 1, 18)

Chief Justice Marshall noted:

The objects to which the power of regulating commerce might be directed, are divided into three distinct classes – foreign nations, the several States, and Indian tribes. When forming this article, the convention considered them as entirely distinct. (30 U.S. 1, 18)

In an attempt to reconcile the conflicting issues of the separate sovereignty of the tribes recognized by the U.S. government with the issue of the distinctly separate categories of foreign nations, states, and Indian tribes enumerated in Article I, § 8, ¶ 3 of the Constitution, Marshall began by framing the apparent contradictions:

Though the Indians are acknowledged to have an unquestionable, and heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. (30 U.S. 1, 17).

If not a part of any of the states of the Union, and if not a foreign nation in the constitutional sense of the term, what, then, was the status of the Cherokee Nation specifically and of the various Indian nations generally? Chief Justice Marshall concluded:

They may, more correctly, perhaps, be denominated *domestic dependent nations*. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of

possession ceases.... They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility. (Emphasis added) (30 U.S. 1, 17-18)

The Chief Justice then applied the majority's finding to the legal issue at hand:

[A]fter mature deliberation, the majority is of the opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution, and cannot maintain an action in the courts of the United States. (30 U.S. 1, 20)

The original issue triggering the lawsuit by the Cherokee Nation, could state laws operate to the disadvantage of tribal members' rights and of the tribe itself, remained unanswered by *Cherokee Nation v. Georgia*. Two subsidiary questions, what rights did tribal members possess, and what exactly was the status of a domestic dependant nation, also remained unanswered. These questions would be addressed a year later in *Worcester v. Georgia* as a result of two missionaries, working with tribal members and living within the Cherokee Nation, confronting the repressive Georgia statutes.

***Worcester v. Georgia, 31 U.S. 350 (1832).***

The legal facts of *Worcester v. Georgia* began when Samuel Worcester and Elizur Butler, two American Board missionaries to the Cherokees, were indicted by a Gwinnett County grand jury in Georgia for "residing with the limits of the Cherokee Nation without a license" and for having failed to take "the oath to support and defend the constitution and laws of the State of Georgia" (31 U.S. 350, 359). Worcester & Butler were subsequently arraigned, tried, found guilty, and sentenced by the Superior Court of the County of Gwinnett "for residing in the Cherokee Nation without license" (31 U.S. 350, 361). The sentence of "hard labor" was to be served in the Georgia penitentiary for a "term of four years" (31 U.S. 350, 361). Following the

arrest, conviction, and sentencing of its two missionaries, the “American Board of Commissioners for Foreign Missions ... hired William Wirt and John Sergeant to bring the Cherokee cause against Georgia to the Supreme Court” (Prucha, 1984, 1986, p. 76). Upon application by Wirt, formerly the nation’s Attorney General, the U.S. Supreme Court granted a Writ of Error and ordered Georgia officials to appear before the Court “to show cause, if any there be, why judgment rendered against [the defendants] ... should not be corrected, and why speedy justice should not be done to the parties in that behalf” (31 U.S. 350, 362).

Debo characterized the situation and summarized the outcome of the case: “This time there was no question of the Supreme Court’s jurisdiction, and in the *Worcester v. Georgia* decision in February, 1832, the Cherokees won a complete victory” (Debo, p. 121). According to Prucha, “Marshall’s decision in the case of *Worcester v. Georgia*, delivered on March 3, 1832, was a forthright vindication of the Cherokee position, for he declared unconstitutional the extension of state law over Cherokee lands” (Prucha, 1984, 1986, p. 76). Despite the confusion over the actual date of the opinion (February for Debo, March for Prucha), the Court addressed the issues in *Worcester v. Georgia* that had been avoided in *Cherokee Nation v. Georgia*.<sup>133</sup> The legal questions arising from the state-tribal conflict included: 1) What is the legal status of Indian tribes as domestic dependent nations; 2) can state laws govern tribes and their members; 3) who exercises political sovereignty over tribal members; and 4) what is the political status of tribal members?

Chief Justice Marshall delivered the Court’s opinion. According to the Court, the law of nations, the Constitution of the United States, the treaties made between the Cherokee nation of Indians and the United States, and the multiple acts of Congress each served to recognize the political sovereignty of the Indian nations. In addressing the law of nations, Chief Justice

Marshall articulated the legal viewpoint of the European discovery of North America, a viewpoint seldom found in the histories presented in elementary, secondary, and postsecondary history textbooks or courses of study. The Chief Justice began with the first contacts between the inhabitants of America and Europe:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other, and of the rest of the world, having institutions of their own, and governing themselves by their own laws. (31 U.S. 350, 368)

Marshall illustrated the absurdity of Georgia's jurisdictional claims by citing the reverse argument of tribal claims to sovereignty over the European nations.

It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either, by the other, should give the discoverer rights in the country discovered, which annulled the pre-existing right of its ancient possessors. (31 U.S. 350, 368)

Continuing his discussion of the law of nations, Chief Justice Marshall referenced the doctrine of discovery as a compact among the various European governments which "gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it" (31 U.S. 350, 369). Marshall spelled out the political aspects of the doctrine of discovery:

It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. (31 U.S. 350, 369)

Since the "United States succeeded to all the claims of Great Britain, both territorial and political" following the American Revolution, Chief Justice Marshall noted the compliance of the crown's charters to the various American colonies with the law of discovery: "[T]hese grants

asserted a title against Europeans only, and were considered as blank paper, so far as the rights of the natives were concerned” (31 U.S. 350, 370). Continuing to connect the law of nations with the British colonization of North America, the Chief Justice described the political situation at the beginning of British settlement of North America:

This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. (31 U.S. 350, 369)

Although “power, war, [and] conquest give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend,” the power of making war “conferred by these charters on the colonies” was for defensive purposes only (31 U.S. 350, 369; 31 U.S. 350, 370). Citing specific royal charters, Chief Justice Marshall continued:

The charter to Connecticut concludes a general power to make defensive war with these terms: “and upon just causes to invade and destroy the natives or other enemies of the said colony.” The same power, in the same words, is conferred on the government of Rhode Island. This power to repel invasion, and, upon just cause, to invade and destroy the natives, authorizes offensive as well as defensive war, but only “on just cause.” The very terms imply the existence of a country to be invaded, and of an enemy who has given just cause of war. (31 U.S. 350, 370)

Marshall concluded his discussion of the law of nations and the British example by noting the difference between curtailing a tribal government’s foreign relations and noninterference with the internal affairs of the tribe:

Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown, to interfere with the internal affairs of the Indians, further than to keep out the agents of foreign powers... The king purchased their lands, when they were willing to sell, at a price they were willing to take, but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies, but never

intruded into the interior of their affairs nor interfered with their self-government, so far as respected themselves only. (31 U.S. 350, 371)

In moving to his discussion of treaties as evidence of tribal sovereignty, Chief Justice Marshall first summarized the British example.

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted; she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged. (31 U.S. 350, 372)

Observing that the Cherokees had sided with the British during the American Revolution, Marshall noted that the first treaty between the Cherokees and the United States had been concluded in 1785. To counter possible claims that the Cherokee held an inferior bargaining position, the Chief Justice posed the following question: “[D]id the Cherokees come to the seat of the American government to solicit peace; or, did the American commissioners go to them to obtain it” (31 U.S. 350, 374)? In answer, Marshall noted that “[t]he treaty was made at Hopewell, not at New York” (31 U.S. 350, 374). After discussing the various articles of the Treaty of Hopewell, Chief Justice Marshall concluded, “The only inference to be drawn from them is, that the United States considered the Cherokees as a nation” (31 U.S. 350, 375). Marshall next focused on the succeeding Treaty of Holston between the Cherokees and the U.S. that was negotiated in 1791. After discussing specific articles of that treaty, Chief Justice Marshall summarized the Treaty of Holston:

This treaty, thus explicitly recognizing the national character of the Cherokees, and their right of self-government; thus guarantying their lands; assuming the duty of protection, and, of course, pledging the faith of the United States for that protection; has been frequently renewed, and is now in full force. (31 U.S. 350, 377)

Marshall concluded his summary of the Treaty of Holston by noting treaty provisions specifically pertinent to the facts of *Worcester v. Georgia*:

To the general pledge of protection have been added several specific pledges, deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders. (31 U.S. 350, 377)

Chief Justice Marshall transitioned to the various acts of Congress as recognition of tribal sovereignty in a manner and context that implied it flowed from a combination of the law of nations concepts inherited from Britain as well as the need to enforce treaty stipulations.

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. (31 U.S. 350, 377)

Continuing, the Chief Justice next argued that both treaties and congressional action, with the implied support of the law of nations, acted to separate tribal lands and the tribes from the various states.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. (31 U.S. 350, 378)

Chief Justice Marshall next played the constitutional trump card when he noted “the adoption of our existing constitution” (31 U.S. 350, 379). He continued:

That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. (31 U.S. 350, 379)

Having completed his discussion of the law of nations, of treaties, of congressional action, and of constitutional requirements in separate fashion, Marshall then proceeded to summarize the impact of the law of nations upon the political status of Indian tribes.

The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate... (31 U.S. 350, 379)

The Chief Justice then noted the nexus between treaties and the Constitution in terms of their impact upon the political status of Indian tribes.

The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation,” are words of our own language... We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense. (31 U.S. 350, 379)

Chief Justice Marshall concluded his summary by confronting the notion that treaties with the tribes that placed them under the protection of European governments, or later of the United States, acted in a way to abolish tribal sovereignty. According to Marshall:

[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence – its right to self-government – by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. (31 U.S. 350, 380)

Having brought the law of nations and specific historical examples, the status and specific provisions of treaties, the various acts of Congress, and the Constitution to bear on the facts and legal issues of the case, Chief Justice Marshall delivered the Court’s conclusions.

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. (31 U.S. 350, 380)

The Chief Justice continued:



The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States. The act of the state of Georgia, under which the plaintiff in error was prosecuted, is, consequently void, and the judgment a nullity. (31 U.S. 350, 380)

Worcester's conviction was "reversed and annulled" because the Georgia court's judgment was based on a law that was "void, as being repugnant to the constitution, treaties and laws of the United States" (31 U.S. 350, 381). On March 5, 1832, the Supreme Court "issued a special mandate to the Georgia court ordering it to reverse its decision and to release Worcester and Butler" (Burke, p. 524). The aftermath of the Court's ruling and order to release the two imprisoned missionaries, Samuel Worcester and Elizur Butler, added a bizarre, disturbing, and complex footnote to our nation's history.<sup>134</sup>

According to the two Cherokee cases, tribes occupied a unique position in American government. They were not a part of either the federal or the individual state governments. Instead each individual tribe was a domestic dependant nation. Tribal members were not citizens of either the United States or of the individual states in which their tribal lands were located; instead they were citizens of their tribes. Legally, the various Indian nations and their members were subject to their tribal governments, to the treaties negotiated between their tribe and the United States, and to the federal legislation enacted as a result of both treaties and the law of nations. State laws possessed no legal status regarding the Indian nations and their tribal members. As ruled by the Supreme Court, "The whole intercourse between the United States and this nation [the Cherokee Nation], is, by our Constitution and laws, vested in the government of the United States" (31 U.S. 350, 380). The Indian nations still possessed their original powers of self-government except with respect to foreign relations in terms of trade and alliances. As the Supreme Court had observed in *Worcester v. Georgia*:

The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate... (31 U.S. 350, 379)

### **Euro-american cultural imperialism.**

Even as the Cherokee Cases were wending their way through the legal system, efforts were underway by the Jackson administration to remove the Cherokee and other tribes to Indian Territory west of the Mississippi River. Following both the Cherokee Cases and the removal of the Five Civilized Tribes from lands east of the Mississippi, additional efforts would be made to reduce tribal sovereignty through legislation and treaties, which would trigger additional Court cases. The efforts to reduce tribal sovereignty were grounded in what one scholar termed “cultural imperialism,” which in turn was grounded in a view of white superiority that took for granted the superiority of western civilization (Prucha, 1984, 1986, p. 233). Also taken for granted was the superiority of agricultural-based societies over hunter-gatherers.

### ***Caldwell v. The State of Alabama, 1 Stew. & P. 327 (Ala., 1832).***<sup>135</sup>

These views of cultural and racial supremacy, or of cultural imperialism when transformed into action, found clear expression in a relatively obscure legal opinion that was written during the same time period as the Cherokee cases and was authored by the Chief Justice of the Alabama Supreme Court in *Caldwell v. The State of Alabama*, 1 Stew. & P. 327 (Ala., 1832), a case that was included in a collection documenting “The Case of the American Indian Against the Federal Government of the United States” (Deloria, 1971, cover page). Addressing what he described as a “high pretension of savage sovereignty,” Alabama Chief Justice Lipscomb began his analysis:

If a people are found in the possession of a territory, in the practice of the arts of civilization; employed in the cultivation of the soil, and with an

organized government, no matter what may be its form they form an independent community; their rights should be respected, and their territorial limits not encroached on. (1 Stew. & P. 327, 332)

Referring to what the Alabama Chief Justice termed an unwritten “code of national law, by which political societies should be tried,” Lipscomb declared:

Savage tribes without a written language, or established form of government, and wholly ignorant of the customs and usages of civil society, are not capable of appreciating the principles of this code; and, (not yielding obedience to its canons) have never been looked on as parties to this compact of nations. (1 Stew. & P. 327, 333)

First asking a rhetorical question focused on his previous assertion about the unwritten code of law governing the civilized nations of the world, the Alabama Chief Justice then proceeded to frame his lengthy answer to that question. First, the question:

Were the natives of this vast continent, at the period of the advent of the First Europeans, in the possession and enjoyment of those attributes of sovereignty, to entitle them to take rank in the family of independent governments? (1 Stew. & P. 327, 333)

The state chief justice began his answer:

They were composed of numerous tribes, subsisting by fishing and hunting, without any uniform or established system of government,,,, The fairest quarter of the globe is roamed over by the Wildman, who has no permanent abiding place, but moves from camp to camp, as the pursuit of game may lead him. He knows not the value of any of the comforts of civilized life... In what way is he to be treated with? As well might a treaty, on terms of equality, be attempted with the beast of the same forest that he inhabits. (1 Stew. & P. 327, 333-334)

Employing the propaganda technique of “false dichotomy” (See Appendix M), the Alabama Chief Justice next presented what he deemed to be the two choices confronting the European colonists, after which he couched the European’s choice in terms of the primacy of agricultural societies.<sup>136</sup>

The civilized nations of Europe, had either to adjust among themselves, a fair, an equitable mode of acquisition according to their own canons of

morality and national law, or to leave this fair continent in the rude and savage state in which they found it. They reasoned, and reasoned correctly, that the right of the agriculturists was paramount to that of the hunter tribes. (1 Stew. & P. 327, 335)

In support of the state high court's endorsement of agricultural superiority over hunters and gatherers, the Alabama Chief Justice quoted the Swiss jurist Vattel's writings on the law of nations, writings which were grounded in a Euro-centric viewpoint and which "applied a theory of natural law to international relations" (Emmerich de Vattel, 2009, ¶ 1).

[T]he cultivation of the soil is not only to be recommended by government, on account of the extraordinary advantages that flow from it, but from its being an obligation imposed by nature on mankind; the whole earth is appointed for the nourishment of its inhabitants, but it would be incapable of doing it, was it uncultivated. (1 Stew. & P. 327, 335-336)

The chief jurist of Alabama continued to quote Vattel's arguments for dispossessing the original inhabitants of North America as justification for Alabama's judicial position:

We have already observed, in establishing the obligation to cultivate the earth, that those nations can not exclusively appropriate to themselves more land than they have occasion for, and which they are unable to settle and cultivate. (1 Stew. & P. 327, 336)

In an earlier incarnation of the "Lebensraum" principle that would be appropriated and misused by Hitler some centuries later to justify Nazi imperialism against its eastern European neighbors,<sup>137</sup> Alabama Chief Justice Lipscomb quoted Vattel's view on the European dispossession of the various tribal inhabitants already living on the land when the Europeans arrived:

Their removing their habitations through those immense regions, can not be taken for a true and legal possession; and the people of Europe, too closely pent up, finding land in which these nations are in no particular want, and of which they make no actual and constant use, may lawfully possess it and establish colonies there. (1 Stew. & P. 327, 336)

In a separate opinion Alabama Supreme Court Justice Taylor articulated an “ends justify the means” argument for dispossessing the tribal inhabitants from their lands. Before asking what he had determined were the two critical questions, the Alabama justice painted a before-and-after scenario of the European’s impact upon North America:

But when we contemplate the change which has been wrought in this one savage wilderness, by the arts, the industry, and the superior knowledge of the new population; when we visit our thronged cities, smiling fields, and happy habitations; when we contemplate our numerous bays and harbors, once the resort only of the wild fowl and the inhabitants of the deep; now studded with ships and vessels of all sizes and nations, pouring upon these lands the rich and extensive commerce of a whole world; when, instead of a roving tribe of hunters, we behold a powerful nation of agriculturists, as free in every desirable liberty, as their savage predecessors; when our happy political institutions and the religion of the Bible, have displaced their barbarous laws, and wretched superstitions; ... (1 Stew. & P. 327, 445)

Alabama Supreme Court Justice Taylor then provided the *dénouement* to his argument:

... can we wish these effects of civilization, religion, and the arts, to disappear, and the dark forests and roaming Indian again to possess the land? Are we not compelled to admit that the superintending providence of the Being who first formed the earth, is to be seen in this mighty change? (1 Stew. & P. 327, 445)

***The cherokee example.***

The widespread views of whites towards Indians articulated by the Alabama Supreme Court raise an interesting question. When all is said and done, what reception would an indigenous nation receive if it met the expectations articulated by Alabama Supreme Court Justice Taylor and his fellow justices? If a tribe and its members transformed themselves from a hunter-gatherer society to one based on agriculture, if it developed its own alphabet system and a system of writing the tribal language that was accompanied by widespread literacy among tribal members, if it encouraged the development of a formal educational system for its young people, if it adopted a republican form of government based on a written constitution – if, in short, the

tribal society adopted Euro-American political-economic forms while maintaining its own unique cultural identity – would such developments be welcomed and meet with the approval of the dominant American society? The Cherokee example provides an answer.

At the beginning of the nineteenth century, the Cherokee Nation “had begun to ask for schools” (Debo, p. 113). A noted student of the history of the various Five Civilized Tribes described the response:

The Moravian Brethren came in 1801, and the Presbyterians opened a school a little later. Spectacular progress began when the American Board of Commissioners for Foreign Missions began its work there in 1817. Then the educational work of the missionaries was simplified when just at this time the Cherokee genius Sequoyah reduced the language to writing. (Debo, p. 113)

Having never come under the influence of missionaries nor having any extensive contact with either British or Americans, Sequoyah neither spoke nor wrote any English. However, “[H]e knew that the white man had a system of conveying messages by making marks on paper. He said, ‘I thought that would be like catching a wild animal and taming it’” (Debo, p. 113).

Continuing her narrative, Debo described Sequoyah’s work and its impact on the Cherokee:

Working for years, finishing in Arkansas in 1821, he isolated eighty-six Cherokee syllables and assigned a character to each one. Thus the Indian simply memorized the characters; then he could read or write anything in the language. Almost immediately the whole tribe became literate, and the Western and Eastern divisions began to communicate with each other in writing. (Debo, p. 113)

Beginning in 1828, the Cherokee Nation began publishing a tribal newspaper “with columns in English and Cherokee,” using a printing press whose type had been made in Boston, the home of the American Board of Commissioners of Foreign Missions (Debo, p. 114). Over a twenty-year period, the Cherokee Nation worked to develop a republican form of government based on both a written constitution and legal code. Debo described the process:

In 1808 the Cherokees had begun to formulate a legal code – necessarily written in English. Then step by step they developed a responsible government to take the place of the haphazard rise of chiefs. In 1828 they elected delegates to a constitutional convention, which created a government with a principal chief, a bicameral council, and a system of courts with orderly procedures and jury trial; and they participated freely in the election that followed. (Debo, p. 114)

Another historian, speaking of the southern tribes generally and of the Cherokee specifically, summarized the economic & political transformations of tribal society:

These Indian nations, persuaded by federal officials and aided by federal funds, had abandoned hunting for farming. The change attached them to their lands, created in them a sense of property, and made the wild lands west of the Mississippi seem uninviting. This economic change had its political counterpart. In 1827 the Cherokees adopted a constitution modeled after that of the United States, and declared themselves an independent nation with an absolute right to soil and sovereignty within their boundaries. By these two acts, the Cherokees reasserted their autonomy with respect to Georgia and their independence from the United States. (Burke, p. 503)

The previously described transformational activities of the Cherokee Nation immediately preceded the State of Georgia's seizure of Cherokee lands, the Indian Removal Act, the two Cherokee cases, Georgia's defiance of the Court ruling in *Worcester* with the initial encouragement of President Jackson, and the Cherokee Nation's subsequent removal to the Indian Territory west of the Mississippi.

### **Federal reduction of tribal sovereignty.**

#### ***Overview.***

Before proceeding further, it would be wise to keep some basic points in mind. While the Cherokee cases answered basic questions about tribal status and sovereignty, a focus on this single point would obscure the varied and differing threads constructing the evolving tapestry we now call American Indian policy. Describing the policy towards the various indigenous nations inhabiting the continental United States as a “complex matter,” one historian explained:

There were too many factors involved, too many different viewpoints towards the Indians, too many hindrances in carrying out an established policy to permit easy generalizations. American Indian policy grew bit by bit. Principles were worked out from time to time as experience deepened and as circumstances changed. Prucha, 1962, p. vii)

If one focuses upon the federal government, all three branches (judicial, legislative, and executive) were involved in formulating and implementing American Indian policy, but not always in a coordinated, functional manner. "...Indian policy did not spring full-blown from some statesman's brow, but rather was a slow growth, developing under the press of circumstances and the pressures of diverse groups" (Prucha, 1962, p. vii). As a result, sometimes treaties dominated, at other times congressional legislation, at yet other times presidential policy, while at other times Court rulings dominated the field. And yet, while needing to be aware of the complexities of Indian-white relations as they evolved over the years, it is also important to keep in mind a basic understanding, keeping cognizant that policy towards the Indian nations developed "as the federal government sought solutions to the problems caused by the presence of the Indians" (Prucha, 1962, p. 1). To further explain:

These problems the new nation inherited from Great Britain when it acquired its independence; they grew out of the given fact that the Indians were here when the white man arrived and that their presence on the land formed an obstacle to the westward advance of the white settlers. (Prucha, 1962, p. 1)

So, while the policy responses were complex, the origin of the need to develop policy responses was quite simple.<sup>138</sup>

At the same time, the various tribes did not constitute a single homogenous entity, but instead represented multiple, differing cultures and languages. Further complicating consideration of U.S. policy towards the Indian nations (out of which eventually emerged citizenship), individual tribes were situated at differing points along a time-line continuum



regarding their interactions with Europeans and with the United States. The specific year of each tribe's initial interactions with nonIndians and of the tribe's first official actions with a nonIndian government varied according to tribal locations which, in turn, helped determine when the tide of white encroachment reached it. For some tribes contact with nonIndians occurred prior to the birth of the United States as a nation while for others tribal contact of a governmental nature with Euro-Americans happened afterwards. For the Narragansett, Mohegan, Wampanoag, and Pequot this occurred before the dawning of the eighteenth century while for the Lakota, Cheyenne, Arapaho, and Apache it did not occur until the mid-nineteenth century. At the time the Stockbridge were being assimilated, the Choctaw and Shawnee were being removed to locations west of the Mississippi. While the Meskwaki were returning from the Indian Territory and purchasing land in Iowa for their tribe, the Lakota were wiping out Lieutenant Grattan's military unit following his troops' firing on a peaceful village. As can be seen, official and unofficial relations in terms of trade, treaties, wars, legislation, and court cases varied across time and space for individual tribes.

In somewhat of a contrast to the preceding complexity, after the various tribes inhabiting the original thirteen colonies had been subjugated and no longer posed a military threat, the majority of Americans viewed the various tribes and tribal members, not as Cherokees or Iroquois, but as subhuman members of an inferior civilization. The prevalence of a worldview grounded in white superiority and nonwhite inferiority, overlaid with a veneer of assumptions regarding the superiority of western civilization and of agricultural-based societies, reinforced notions that the untamed members of tribes living on homelands west of the Mississippi beyond the immediate reach of American civilization would need to be educated to civilization. The foregoing cultural imperialism encouraged encroachment on Indian lands,<sup>139</sup> which, in turn, led

to more treaties and agreements whereby tribal landholdings were reduced. At the same time the subsequent interplay between Court opinions, congressional legislation, presidential policies, and Euro-American cultural imperialism would combine to reduce tribal sovereignty.

To re-emphasize an earlier point, Indian citizenship and voting rights were bound up in discussions of tribal sovereignty. The Marshall Court's rulings on tribal sovereignty served as both precedent and as a high-water mark. Over the ensuing decades efforts were made to chip away at tribal sovereignty via treaties, legislation, and court cases. As will be shown, while subsequent Supreme Courts acknowledged the Marshall Court's rulings in the two Cherokee cases, the opinions generally acted in one of three ways:

- 1) either to assert the primacy of federal control over Indian affairs against state efforts;
- 2) to uphold tribal sovereignty which provided impetus for subsequent congressional action to diminish tribal sovereignty; or
- 3) to uphold congressional action asserting greater federal control over the internal affairs of the Indian nations.

For the remainder of the nineteenth century, ideas of citizenship for tribal members intertwined with efforts to educate and Christianize tribal members, with attempts to diminish tribal sovereignty, and with notions of separating tribal members from their tribal government. In psychological terms, this latter notion meant removing tribal members from the cultural support mechanisms developed over the tribe's history, and putting tribal members on their own, which, it was hoped, would turn them into imitations of the dominant white citizenry. At the same time it would reduce diminish tribal authority. By the mid-nineteenth century, removal of the eastern tribes to lands west of the Mississippi had met the objectives of two differing groups of nonIndians. Removal as a policy option had been made possible by the purchase of the

Louisiana Territory under President Jefferson, Prucha explained the motivating forces behind one group:

It cannot be denied that the land greed of the whites forced the Indians westward and that behind the removal policy was the desire of eastern whites for Indian lands and the wish of eastern states to be disencumbered of the embarrassment of independent groups of aborigines within their boundaries. (Prucha, 1962, p. 224)

The other group centered its attention not on “selfish economic motives,” but on the “preservation and civilization” of the tribal members (Prucha, 1962, pp. 225, 224). In this latter group’s views:

[T]he contact of the Indians with white civilization had deleterious effects upon the Indians that far outweighed the benefits. The efforts at improvement were vitiated or overbalanced by the steady pressure of white vices, to which the Indians succumbed. Instead of prospering under white tutelage, the Indians were degenerating and disappearing. (Prucha, 1962, p. 224)

Because of these circumstances, this group supported Indian removal as a government policy. They “argued with great sincerity that only if the Indians were removed beyond contact with whites could the slow process of education, civilization, and Christianization take place” (Prucha, 1962, p. 225).

However, as the tide of white settlement continued to expand in a westward direction and crossed the Mississippi River, removal became a less feasible policy option. The presence of tribes hostile to white intrusions also complicated matters. The situation was clear enough in 1849 that the Committee on Indian Affairs recognized “that the United States was fast running out of land to which native people could be permanently removed” (Wilson, p. 289). As described by one historian, the Committee concluded:

that the only “alternative to extinction” was to settle “our colonized tribes” on government-run “reservations,” where they could be protected against dispossession and extermination until they were “sufficiently advanced in

civilization ... to be able to maintain themselves in close proximity with, or in the midst of, a white population.” (Wilson, p. 289)

At the same time, deeply embedded in the American psyche was the notion of the superiority of agricultural-based societies. Jefferson’s promotion of the yeoman farmer as constituting the backbone of the American civilization reinforced the agricultural ideal.

No panacea for the Indian problem was more persistently proposed than allotment of land to the Indians in severalty. It was an article of faith ... that civilization was impossible without the incentive to work that came only from individual ownership of a piece of property. (Prucha, 1984, 1986, p. 224)

Allotment’s impact on government policy towards the Indian nations appeared in several early forms, most notably treaties and special legislation, prior to its enshrinement as official policy with the passage of the Dawes Severalty Act. Allotment and citizenship intertwined as part of a cause-and-effect relationship. In Connecticut Senator Orville H. Platt’s view, “[A]llotment of land in severalty, and citizenship, are the indispensable conditions of Indian progress” (Cohen, 1942/1971, p. 154, n. 18). Individual ownership of land would act to “civilize” individual tribal members and lead eventually to citizenship. This aspect of allotment attracted support from many, especially the reformers. Allotment’s reduction of the tribal land mass attracted support from those coveting Indian land. Both groups supported allotment’s implied reduction of tribal sovereignty. President Theodore Roosevelt characterized allotment as “a mighty pulverizing engine to break up the tribal mass” (Cohen, 1942/1971, p. 154).

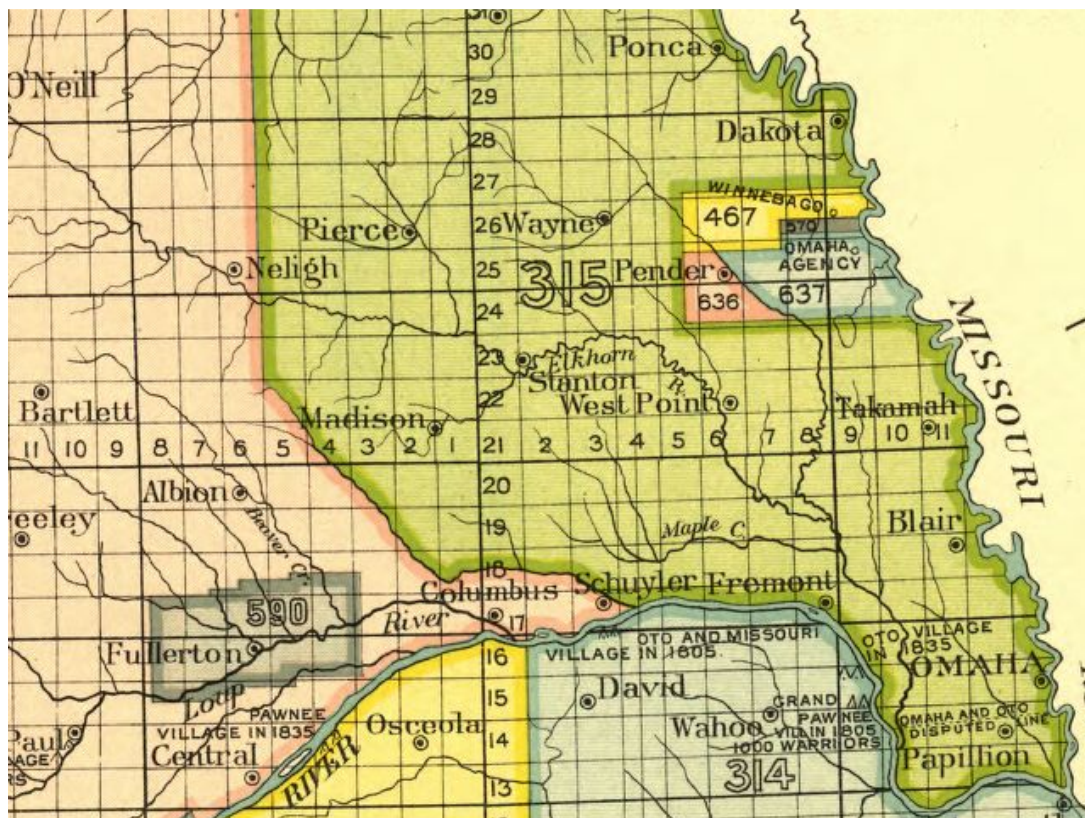
### ***Omaha treaty of 1854.***

Owing to the different situational relationships between various tribes and the federal government, and owing to the gradual evolution of the nation’s Indian policy in incorporating allotment into its policy towards tribal members, allotment was offered to some through treaties, to others through legislation specific to the tribe, and to yet others through general legislation.

The period 1854 – 1861 witnessed multiple “experiments in allotment” using the treaty process whereby the federal government entered “into negotiations with the tribes west of the states of Missouri and Iowa for white settlement on their land, and extinguishment of their title” (Cohen, 1942/1971, p. 62). For example, the treaty negotiated between the Omaha and the U.S. in 1854, whereby the Omaha ceded most of their lands “west of the Missouri River” to the United States, and whereby the United States “set apart” certain undesignated lands to be “reserved by the Omahas for their future home,” contained an article that granted the President authority, “at his discretion,” to

cause the whole or such portion of the land hereby reserved, as he may think proper ... to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home. (Kappler, 1904/1971, v. II, p. 612)

*Figure R1*  
*Omaha Land in Nebraska Ceded by the Treaty of 1854*



According to Articles 4 and 5 of the “Treaty with the Omaha, 1854,” the United States agreed “to pay to the Omaha Indians” \$881,000 “for the country ceded” with the payments being spread out over a forty-year period (Kappler, 1904/1971, v. II, p. 612) (See preceding Figure R1, # 315 for the land being ceded by the Omaha & #’s 467, 570, 636, & 637 for the land being reserved for the Omaha; for determination of map numbers identifying particular cessions, see Royce, pp. 790-791).<sup>140</sup>

However, some sixty-four (64) years later, it appeared the federal government had not paid a single penny of its obligations to the Omaha. In a case filed by the tribe against the U.S. that was argued before the U.S. Court of Claims in 1918, the Omaha declared that “the Government had failed to pay anything” for the ceded land (Cohen, 1942/1971, p. 63, n. 506). The “Treaty with the Omaha, 1854” had been signed on March 16, 1854, and ratified by the U.S. Senate on April 17, 1854 (Kappler, 1904/1971, v. II, p. 611). Federal attorneys admitted that the U.S. had not paid anything to the Omaha Tribe since the treaty’s ratification by the Senate, but they justified this failure by contending “that the Omaha Indians did not own and [therefore] did not have the right to make a cession thereof” (Cohen, 1942/1971, p. 63, n. 506). Finding for the Omaha Tribe, the Court of Claims directly rebutted the federal government’s arguments:

At the time the treaty was made the United States recognized the Omahas as having title to this land..., and specifically promised to pay for it.... [T]he defendants can not now be heard to say that the Indians did not own the land when the treaty was made and had no right to make a cession of it. (*Omaha Tribe v. United States* (1918), 53 Ct. Cl. 549, 560)

Also, by that time (1918), the Omaha land base reserved to them by the Treaty of 1854 had been considerably reduced. The 1865 Omaha Treaty ceded further land for the use of the Winnebago (Royce, pp. 834-835) (See Figure R1, # 467 for this land cession). An additional congressional act in 1882 further reduced the Omaha land base as it provided for the sale of

lands “lying W. of [the] Sioux City and Nebraska railroad [sic]” and stipulated that the “[r]emainder of reservation to be allotted and patented to individuals or to the tribe” (Royce, pp. 908-909) (See Figure 1, #'s 636 & 637 for ceded and allotted land). By the early twentieth century, the Omaha land base was a miniscule fragment of even the small portion of land that had been reserved to them by the Treaty of 1854 (See Figure R1, # 570 for land remaining in the Omaha’s possession).

### **Citizenship – Tied to removal or allotment.**

Allotment’s purpose, among other objectives, was to pave the road to U.S. citizenship for American Indians. The noted expert in federal Indian law, Felix S. Cohen,<sup>141</sup> identified four methods whereby Indians acquired citizenship.

*Table R1:  
Methods Whereby Indians Acquired Citizenship  
Prior to the Indian Citizenship Act & the Example to Be Discussed*

<u>Method of Acquiring Citizenship</u>	<u>Example Discussed</u>
(a) Treaties with Indian tribes.	Cherokee Treaty of 1817 Choctaw Treaty of 1830 Delaware Treaty of 1866
(b) Special statutes naturalizing named tribes or individuals.	Act of March 3, 1843 (Stockbridge)
(c) General statutes naturalizing Indians who took allotments.	Dawes Act of 1887
(d) General statutes naturalizing other special classes.	Act of November 6, 1919 (World War I Veterans)

The preceding table, Table R1, lists the methods identified by Cohen and includes a specific example of each that will be subsequently discussed within a chronological framework that also

includes Supreme Court cases and other congressional legislation bearing on tribal sovereignty, citizenship, and voting rights (See Table R1).<sup>142</sup>

***Citizenship – Cherokee treaty of 1817.***

Treaties with various Indian nations granted citizenship through a variety of means whereby U.S. citizenship was granted to heads of families or to all adults in connection with removal to lands west of the Mississippi River, or citizenship was granted in connection with acceptance of allotment. The Cherokee Treaty of 1817, negotiated “at the Cherokee Agency, within the Cherokee nation, between major general Andrew Jackson..., and the chiefs, head men, and warriors, of the Cherokee nation,”<sup>143</sup> contained the following provisions as listed in Article 8 of the treaty:

And to each and every head of any Indian family residing on the east side of the Mississippi river, on the lands that are now, or may hereafter be, surrendered to the United States, who may wish to become citizens of the United States, the United States do agree to give a reservation of six hundred and forty acres of land, in a square, ... with a reversion in fee simple to their children... (Kappler, v. II, p. 143)

***Citizenship – Choctaw treaty of 1830.***

The Choctaw Treaty of 1830, negotiated at Dancing Rabbit Creek in Mississippi, provided citizenship in connection with removal west of the Mississippi, but under circumstances similar to the previous events between the Cherokee Nation and Georgia that had precipitated two Supreme Court cases, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*. With the Choctaw, there would be no Supreme Court case; instead there would be removal. The opening paragraph of the Treaty of Dancing Rabbit Creek with the Choctaw described the situation existing at the time of the treaty’s negotiation:

Whereas the General Assembly of the State of Mississippi has extended the laws of said State to persons and property within the chartered limits of the same, and the President of the United States has said that he cannot protect



the Choctaw people from the operation of these laws; Now therefore that the Choctaw may live under their own laws in peace with the United States and the State of Mississippi they have determined to sell their lands east of the Mississippi... (Kappler, v. II, pp. 310-311)

It would take America 128 years before a President would use the force of federal troops to stop a state from discriminatory action against a minority of its population in violation of both federal law and the provisions of international law. Another article of the Treaty of Dancing Rabbit Creek would be unilaterally negated by the federal government within a few years as the new lands west of the Mississippi transformed from lands of the Choctaw Nation to the Indian Territory that subsequently became the Oklahoma Territory, which in turn became the State of Oklahoma. Article IV of the Choctaw Treaty of 1830 stated:

The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted their own National Councils. (Kappler, v. II, p. 311)

Owing to the situational differences between the Cherokee in 1817 and the Choctaw in 1830, Article XIV of the Choctaw Treaty of 1830 offered citizenship to any “Choctaw head of a family being desirous to remain and become a citizen of the States” instead of removing westward across the Mississippi River (Kappler, v. II, p. 313). Furthermore, “he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land” (Kappler, v. II, p. 313). Each additional “unmarried child” living in the family who was “over ten years of age” received an additional half-section of land and each child “under 10 years of age” received an additional quarter section of land, each of these additional grants of land “to adjoin the location of the parent” (Kappler, v. II, p. 313). Finally, if the families resided “upon said lands intending

to become citizens of the States for five years after the ratification of this Treaty, ... a grant in fee simple shall issue” (Kappler, v. II, p. 313). Tribal members who remained in Mississippi in order to become citizens and who did not remove westward were guaranteed by the treaty that they would “not lose the privilege of a Choctaw citizen” (Kappler, v. II, p. 313). The concluding Article XXII of the 1830 Treaty of Dancing Rabbit Creek contained an item that was the reverse of the nation’s first treaty with another governmental power, the Delaware Treaty of 1778.

According to Article XXII of the Choctaw Treaty of 1830:

The Chiefs of the Choctaws who have suggested that their people are in a state of rapid advancement in education and refinement, and have expressed a solicitude that they might have the privilege of a Delegate on the floor of the House of Representatives extended to them. (Kappler, v. II, p. 315)

The U.S. declined the request of one of the Five Civilized Tribes, stating that the “Commissioners do not feel that they can under a treaty stipulation accede to the request,” but were willing to present the request as part of the treaty “that Congress may consider of, and decide the application” (Kappler, v. II, p. 315).

### ***Citizenship – Delaware treaty of 1866.***

By 1866 the situation of both the Delaware Nation and the United States had greatly changed from their relative positions in 1778 when the U.S. had offered the possibility of statehood to the Delaware. Article VI of the Delaware Treaty of 1778 began:

Whereas the enemies of the United States have endeavored, by every artifice in their power ... [to convince]the Indians in general ... that it is the design of the [United States] to extirpate the Indians and take possession of their country... (Kappler, v. II, p. 4)

Article VI continued: “[T]o obviate such false suggestion, the United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the

fullest and most ample manner...” (Kappler, v. II, p. 4). The next sentences invited the Delaware to form a state that would have representation in Congress!

And it is further agreed on between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends [with] the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress... (Kappler, v. II, p. 5)

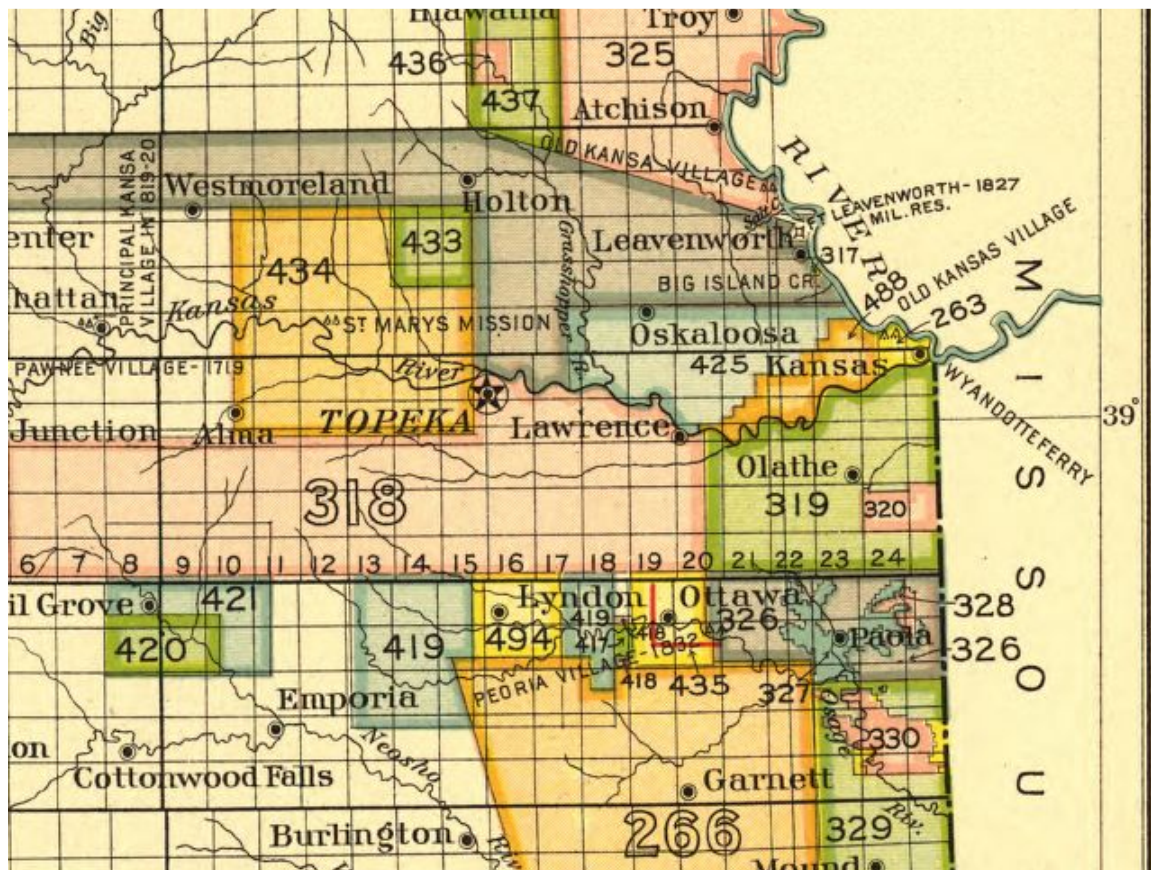
As previously stated, much had changed between 1778 and 1866. For one, the survival of the United States as a nation was no longer in question by 1866. The Delaware’s military assistance was no longer needed by the U.S. in 1866. For another, as the United States had grown stronger, the Delaware Nation’s military and political power had grown weaker. By 1866, the Delaware Nation “had a long history of shifting locales” at the behest of the federal government (Prucha, 1984/1986, p. 88). As described by Prucha:

The Delaware Indians, ... at the beginning of the historic period [of European discovery] were located in what is now New Jersey and Delaware, but at the end of three centuries of movement Delawares were found in Oklahoma, Kansas, Wisconsin, and Ontario. (Prucha, 1984/1986, p. 88)

Prucha’s summary necessarily omitted several details of that movement. A portion of their tribe had removed themselves quite early from contact with the Americans by removing to territory claimed by Spain on land granted to them and the Shawnee “by Baron de Carondelet on behalf of the Spanish government, Jan. 4, 1793” near what today is Cape Girardeau, Missouri (Royce, p. 724). Following the Louisiana Purchase, they removed further west to land in southwest Missouri “lying above the James fork of White river” under the terms of a treaty negotiated October 3, 1818 by territorial governor, William Clark (Royce, p. 724). The bands of Delaware remaining further east were slowly pushed out of Ohio and Indiana by a series of treaties until finally the Indiana Delawares joined “their brethren who had lived in Missouri since 1793” following the Delaware Treaty of 1818 (Royce, pp. 724-725). In a subsequent 1829

treaty, the Delaware ceded their land in Missouri in exchange for lands west of the Missouri River in what is now Kansas “for the permanent residence of the whole Delaware nation” (Royce, p. 724) (See Figure R2, #'s 263, 488, & 425 for the land reserved to the Delaware in Kansas by the Treaty of 1829).<sup>144</sup>

*Figure R2  
Delaware Lands Reserved & Ceded in Kansas*



The permanent residence guaranteed by the Treaty of 1829 didn't turn out to be permanent. In subsequent treaties, the Delaware sold “39 sections” of their new homeland to the Wyandot (See Figure R2, # 263) in an 1843 treaty (Royce, p. 778) and sold another “four sections ... to ‘Christian Indians’ upon payment of \$2.50 per acre” in the Delaware Treaty of 1854, which were sold three years later by said “Christian Indians to A.J. Isacks, May 29, 1857” (Royce, pp. 790-791) (See Figure R2, #'s 425 & 488). Finally, in an 1860 treaty the Delaware sold over half of

their remaining land to the “Leavenworth, Pawnee and Western Railroad Company” (See Figure R2, # 425; Royce, pp. 822-823) and agreed that a “portion of their [remaining] reserve [be] allotted to them in severalty” (See Figure R2, # 488; Royce, pp. 822-823). All of the preceding transactions preceded the Delaware Treaty of 1866, which had been noted by Cohen as an example whereby the U.S. government provided citizenship to American Indians through treaties (See Table R1).

The movement of tribal members from their formerly permanent homeland in Kansas “to the Indian country, located between the States of Kansas and Texas,” occupied center stage in the Delaware Treaty of 1866 (Kappler, v. II, p. 937). The opening sentence of the 1866 treaty clarified the treaty’s purpose: “Whereas Congress has by law made it the duty of the President of the United States to provide by treaty for the removal of the Indian tribes from the State of Kansas, ...” (Kappler, v. II, p. 937) (See Figure R2, # 488 to identify the lands in question being discussed in the Delaware Treaty of 1866). The lengthy opening sentence of the Delaware Treaty of 1866 indicated another reason as well: “[T]he Missouri River Railroad Company has expressed a desire to purchase the present Delaware Indian reservation in the said State, in a body, at a fair price” (Kappler, v. II, p. 937). According to Article 2 of the 1866 treaty, the Delaware had located in Kansas as a result of a previous treaty negotiated in 1829 (Kappler, v. II, p. 938). In the interim between 1829 and 1866, some Delaware lands had been allotted by the Delaware Treaty of 1860 (Royce, p. 822). Article 3 of the 1866 Delaware Treaty offered the opportunity of U.S. citizenship to this group of tribal members:

It shall be the duty of the Secretary of the Interior to give each of all the adult Delaware Indians who have received their proportion of land in severalty an opportunity ... to elect whether they will dissolve their relations with their tribe and become citizens of the United States. (Kappler, v. II, p. 938)

The lands of Delaware tribal members electing to renounce tribal membership in favor of U.S. citizenship were to be “reserved from the sale” of Delaware land described in the treaty (Kappler, v. II, p. 938). The lands of Delaware tribal members who had previously received allotment, but who chose to remain tribal members would be sold with the individual tribal members receiving only the value “for the improvements on the land” (Kappler, v. II, p. 938). Article 9 of the Delaware Treaty of 1866 described the mechanism by which tribal members electing to remain in Kansas would obtain their citizenship. First, “a registry [was] to be made of the names of all of said Delawares who have elected to dissolve their tribal relations and to become citizens of the United States, as provided in this treaty” (Kappler, v. II, p. 940). Next, the Secretary of the Interior was directed to “present a certified copy of the same [registry] to the judge of the district court of the United States for the district of Kansas” as well as send a copy to the “office of the Commissioner of Indian Affairs” (Kappler, v. II, p. 940). Finally, after the list had been compiled and submitted to the designated government officials,

[A]ny of said Delawares, being adults, may appear before the said judge in open court, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and also make proof, to the satisfaction of said court, that he is sufficiently intelligent and prudent to control his own affairs and interests, that he has adopted the habits of civilized life, and has been able to support, for at least five years, himself and family. (Kappler, v. II, p. 940)

Finally, after completing the enumerated steps in not less than five years, and

On the filing of the said certificate [by the federal district judge] in the office of the Commissioner of Indian Affairs, the said Delaware Indian shall be constituted a citizen of the United States, and be entitled to receive a patent, in fee-simple, with power of alienation, for the land heretofore allotted him... (Kappler, v. II, p. 940)

In the penultimate article of the Delaware Treaty of 1866, the U.S. admitted it had not “fulfilled” its financial obligations arising under the 1860 Delaware Treaty and “credited to the Delawares”

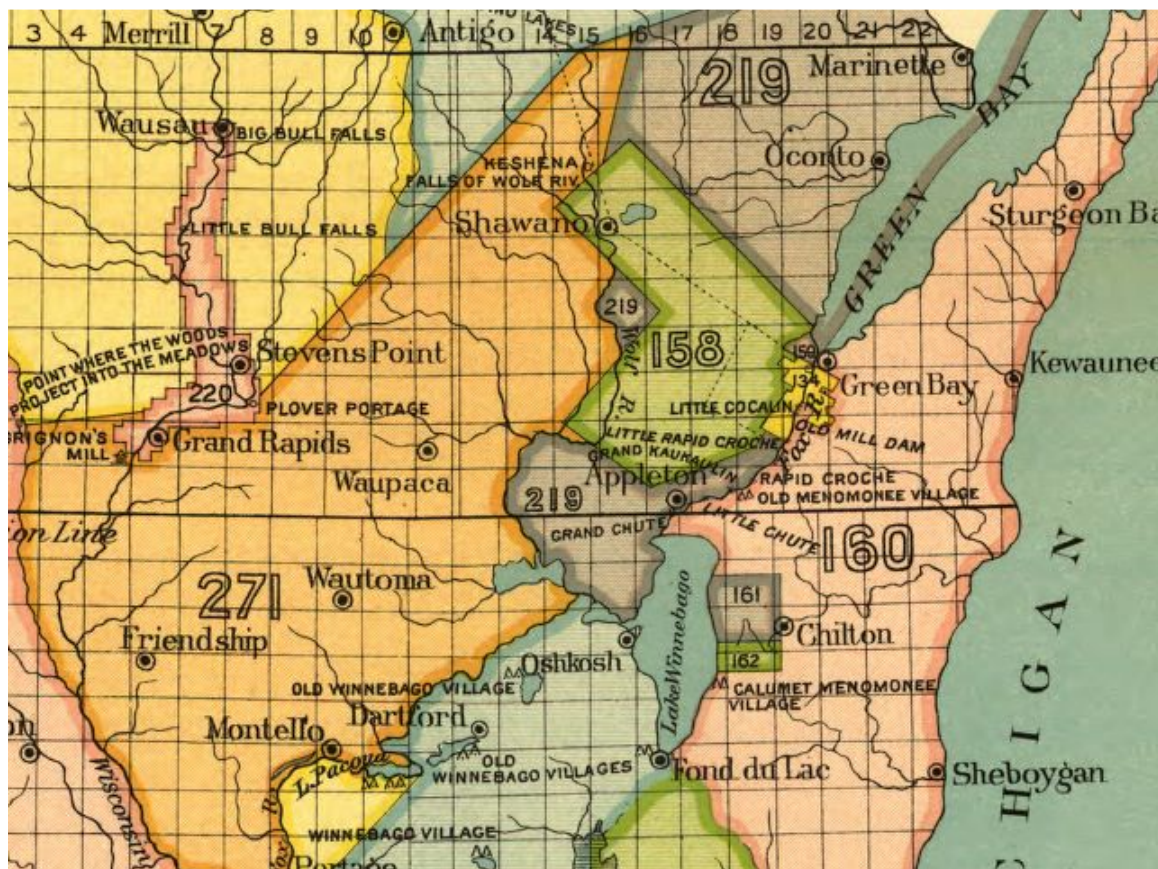


the sum of \$30,000 (Kappler, v. II, p. 941). In the same article, the U.S. promised to investigate “the Delawares’ claim that a large amount of stock ha[d] been stolen from them by whites since the treaty of [1854]” and to pay the “ascertained” amount of “the value of such stolen stock” (Kappler, v. II, p. 941).

*Citizenship – Act of 1843 re: stockbridge tribe.*

Having concluded the discussion of how treaties were used by the federal government to promote citizenship for tribal members, the ensuing discussion focuses on the use of special statutes whereby Congress naturalized specific Indian individuals or tribes. As an example of this procedure, Cohen cited the “Act of March 3, 1843, sec. 7, 5 Stat. 654, 647 (Stockbridge).”<sup>145</sup>

*Figure R3*  
*Lands in Wisconsin Reserved for the Stockbridge-Munsee*  
*by the Menominee Treaties of 1831 and 1832*



A narrow focus on the 1843 act of Congress whereby citizenship was offered to members of the “Stockbridge tribe of Indians” wishing to accept allotments of tribal land would ignore important contexts, both prior and subsequent to the act (Kappler, 1904/1971, v. II, p. 574; 5 Stat. 645).

Such a focus would conceal the fact that the act’s purpose was to allot land that had been previously guaranteed the “Stockbridge & Munsee tribes” in 1832 by the U.S. in its Treaty with the Menominee (Kappler, 1904/1971, v. II, p. 378) (See Figure R3, #161 & #162 [immediately east of Lake Winnebago] for lands guaranteed the Stockbridge, Munsee, & Brothertown Tribes by the Treaty of 1832 that confirmed the Menominee Treaty of 1831; for determination of map numbers identifying land reserved by treaty, see Royce, pp. 730-731).<sup>146</sup>

Although negotiated with the Menominee, the 1832 treaty contained an “Appendix” whereby the Stockbridge and Munsee agreed to accept the land purchased for their use from the Menominee by the United States, the “Appendix” having been signed by the headmen of “the Stockbridges and the Munsees,” among other of the New York tribes (Kappler, 1904/1971, v. II, pp. 381-382).

A narrow focus on the 1843 act impacting the Stockbridge-Munsee would also conceal the 1839 “Treaty With the Stockbridge and Munsee” whereby the land guaranteed to them on the east side of Lake Winnebago in Wisconsin by the United States was reduced by half (Kappler, 1904/1971, v. II, p. 529). While the 1839 treaty contained incentives for the Stockbridge-Munsee to “remove west,” the 1839 treaty also recognized there were Stockbridge-Munsee tribal members who wished “to remain where they now are” and stipulated that the “balance of the consideration money for the lands hereby ceded” would be paid to “such of the Stockbridge and Munsee tribes of Indians ... as remain at their present place of residence at Stockbridge on the east side of Winnebago lake” [sic] (Kappler, 1904/1971, v. II, pp. 529, 530).



A narrow focus on the 1843 act impacting the Stockbridge-Munsee would also conceal the subsequent political split it created in the Stockbridge-Munsee Band of the Mohican Nation (currently the tribe's official name), a split that still carries sensitivity among today's tribal members. The current version of their tribal history references neither the Treaty of 1839 nor the congressional act of 1843, but instead discusses the "federal removal policy [which] caused dissension among the people who remained in Wisconsin" (Mohican History, ¶ 26). The tribal history continues: "Presented with the opportunity by government agents, some Stockbridge people relinquished their Indian status and became tax paying citizens of the United States, while others chose to retain their tribal membership and form of government" (Mohican History, ¶ 26).

A non-tribal history by the Milwaukee Public Museum laid bare more facts. It stated:

In 1843, Congress passed an act making all Stockbridge-Munsee United States citizens. This divided up reservation lands on Lake Winnebago – which had been held communally – among individual tribal members. Many Stockbridge-Munsee consented to this plan and became known as the Citizen Party. The opposition formed the Indian Party ... with the intent to retain the federal status, culture, and political sovereignty of the tribe. (Stockbridge-Munsee History, ¶ 26)

The non-tribal history continued:

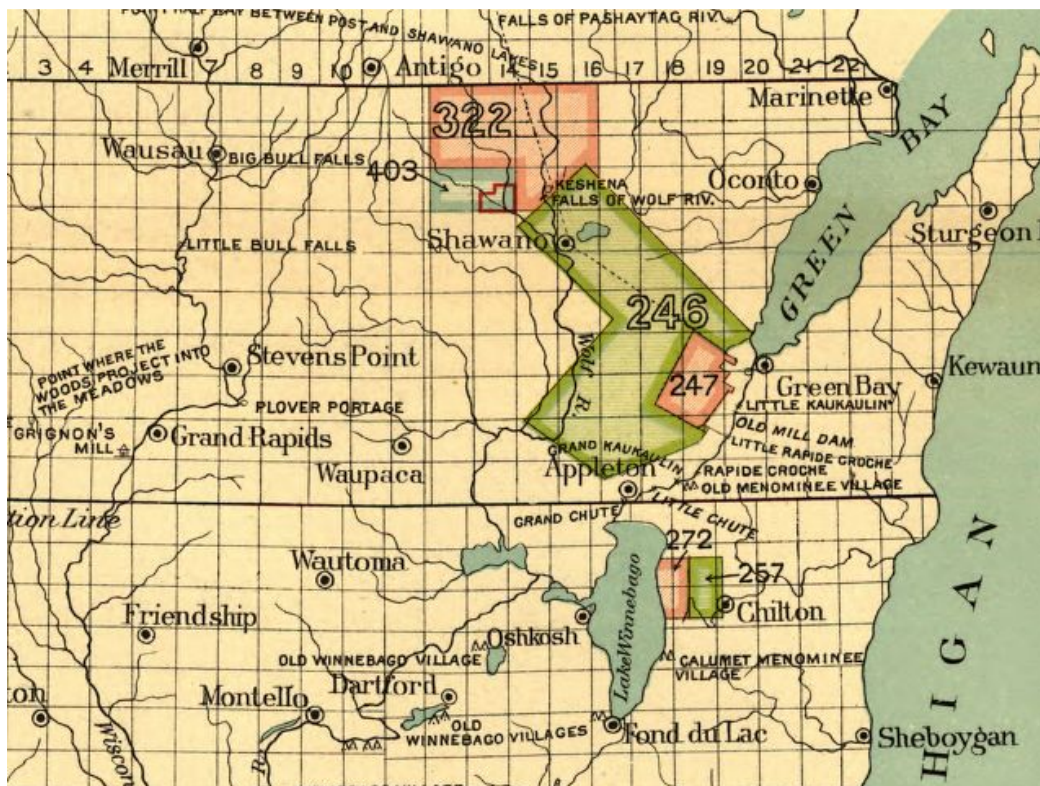
The Indian Party became distressed when Whites began buying up land granted to individual tribal members. [They] lobbied to have the 1843 act repealed, and Congress did so in 1846, but members of the Citizen Party refused to give up their American citizenship and stayed on their allotted lands along Lake Winnebago. (Stockbridge-Munsee History, ¶ 10)

The federal government's version, which was set forth in the Preamble of the 1848 treaty with the Stockbridge Tribe stated that

a portion of said tribe refused to recognize the validity of said act of Congress ..., and upon their petition a subsequent act was passed by the Congress of the United States ... repealing the said act of March 3d, 1843... (Kappler, 1904/1971, v. II, p. 575)

A narrow focus on the 1843 act impacting the Stockbridge-Munsee as an example of how federal legislation was used to promote U.S. citizenship for American Indians would also ignore the subsequent attempts of the federal government to deal with aftermath of the two congressional acts, which in turn had followed two treaties that had been negotiated with the tribe in the short space of seven (7) years. To review, the Treaty of 1832 (purchasing two sections of land from the Menominee on Lake Winnebago for the Stockbridge-Munsee) was revised by the Treaty of 1839 (ceding to the U.S. one of the two sections guaranteed the Stockbridge-Munsee in 1832), which in turn was negated by the Act of 1843 (abolishing all tribal land remaining from the Treaty of 1839 through allotments and making all Stockbridge-Munsee U.S. citizens), which congressional act was negated by the Act of 1846.

*Figure R4*  
*Stockbridge-Munsee Tribal Lands*  
*Guaranteed By the Treaty of 1832 and Modified By the Treaty of 1839*



For the lands guaranteed by the Treaty of 1832, see Figure R4, #257 & #272; for the land ceded by the Treaty of 1839, see Figure R4, #257 (For determination of map numbers identifying land reserved by treaty that was subsequently modified, see Royce, pp. 774-775).<sup>147</sup>

As a result of all these actions on the part of the U.S. government, some Stockbridge-Munsee had forsaken their tribal identity in return for U.S. citizenship and the promise of a fee-simple land patent while other Stockbridge-Munsee rejected U.S. citizenship in order to retain their tribal culture and identity. To maintain the focus on how American Indians received their universal rights of citizenship and voting rights, we will end the discussion of the Stockbridge-Munsee example and proceed to an early case focused on voting rights for a tribal member who severed his tribal ties.

### **Citizenship & tribal sovereignty.**

#### ***Overview.***

Before resuming discussion of the remainder of Cohen's categorical examples whereby American Indians received citizenship via congressional action (the next being the Dawes Allotment Act of 1888), a need exists, based on a belief that understanding historical context promotes a fuller understanding and appreciation of the subject being discussed, to examine a number of related examples that occurred in the judicial realm during the interim between 1866 and 1896. One example also includes a congressional act made in response to a Court ruling. The judicial examples relate to both citizenship and to tribal sovereignty. The congressional legislation touches on a reduction in tribal sovereignty. The court actions and congressional action to be discussed (and their subject matter) include:

- *Elk v. Wilkins*, 112 U.S. 94 (1884); voting rights and the 14th Amendment.
- *The Kansas Indians*, 72 U.S. 737 (1866); federal v. state jurisdiction.

- *Ex Parte Crow Dog*, 109 U.S. 556 (1883); tribal jurisdiction of criminal affairs.
- The Seven Major Crimes Act (1885); removed seven crimes from tribal jurisdiction, thus curtailing tribal sovereignty.
- *United States v. Kagama*, 118 U.S. 375 (1886); Affirmed the legality of the Seven Major Crimes Act and confirmed federal control of crimes on Indian land.
- *Talton v. Mayes*, 163 U.S. 376 (1896); affirmed Cherokee Court's jurisdiction over criminal affairs.

Following discussion of the above-listed items, the focus on Cohen's examples of congressional action granting citizenship to various categories of American Indians and events related to them resumes. These examples and events, along with their subject matter, include:

- Dawes Allotment Act (1888); allotment of tribal lands & citizenship.
- Burke Act (1906); modified the Dawes Act.
- Act of November 6, 1918; citizenship for WWI veterans.
- Indian Citizenship Act (1924); citizenship for all American Indians.
- Subsequent events bearing on tribal sovereignty and voting rights.
  - *Native American Church v. Navajo Tribal Council*, 272 F. 2d. 131 (1959); status of Indian tribes, tribal sovereignty.
  - Civil Rights Act (1968); tribal sovereignty.
  - Meskwaki Voting Rights (1991); school-board elections.

***Citizenship/tribal sovereignty – Elk v. Wilkins, 112 U.S. 94 (1884).***

*Introduction.*

By the 1870s enough developments had occurred in the previous quarter-century respecting citizenship, both for nonIndians and for Indians, that the status of Indians once again become a legal question. Before we can approach the definitive Supreme Court answer to that

recurring question in *Elk v. Wilkins*, however, prior developments to that case deserve attention.

Relevant prior developments include the following:

- an Attorney General’s opinion,
- the Civil Rights Act of 1866,
- the Fourteenth Amendment, and
- a federal district court opinion, *McKay v. Campbell* (D.C. Ore. 1871).

Each of the above-listed items will be addressed prior to a discussion of the facts and of the legal reasoning used by the Court in *Elk v. Wilkins*.

*Attorney general opinion, 1856.*

On July 5, 1856, Caleb Cushing, the U.S. Attorney General, responded to a previous request from the Secretary of the Interior, Robert McClelland, to address the question of “the relation of Indians to citizenship” (7 Op. Att’y Gen. 746). Cushing’s opinion is important because it served as a precedent that was cited in subsequent federal court decisions. Cushing began his opinion by grounding citizenship in the U.S. Constitution, drawing attention to Article II, § 1 which referenced “a natural born citizen” and Article I, § 8 that gave Congress the power “to establish an uniform rule of naturalization” (7 Op. Att’y Gen. 746, 747-748). Cushing concluded, “Here is the first great line of distinction then, - citizens born such, and citizens made such by naturalization” (7 Op. Att’y Gen. 746, 748). In discussing the concepts of alien, citizen, and foreigner, Cushing declared:

The fact, therefore, that Indians are born in the country does not make them citizens of the United States.

The simple truth is plain, that the Indians are the *subjects* of the United States, and therefore are not, in mere right of home-birth, citizens of the United States. (Emphasis in original) (7 Op. Att’y Gen. 746, 749)

Attorney General Cushing continued by emphasizing the distinction between “citizens” and “subjects:”

This distinction between *citizens* proper, that is, the constituent members of the political sovereignty, and *subjects* of that sovereignty, who are not therefore citizens, is recognized [sic] in the best authorities of public law. (See Puffendorf, De Jure Naturæ, lib. Vii, cap. Ii, s.) Fore the same reason, a slave, it is clear, cannot be a citizen. (Emphasis in original) (7 Op. Att’y Gen. 746, 749)

After citing several state court decisions declaring that Indians “are not *pleno jure* citizens,” Attorney General Cushing opined that Indians “cannot become citizens by naturalization under existing general acts of Congress” (7 Op. Att’y Gen. 746, 749). Cushing explained: “Those acts apply only to *foreigners*, subjects of another allegiance. The Indians are not foreigners, and they are in our allegiance, without being *citizens* of the United States. Moreover, those acts only apply to ‘white’ men” (Emphasis in original) (7 Op. Att’y Gen. 746, 749).

Can Indians become citizens? According to Attorney General Cushing’s answer, “Indians, of course, can be made citizens of the United States only by some competent act of the General Government, either a treaty or an act of Congress” (7 Op. Att’y Gen. 746, 749-750). Cushing then proceeded to provide examples whereby Indians were accorded citizenship, either through particular treaties or through specific legislative acts of Congress. According to Cushing, however, the fact that a treaty or legislative act provided an opportunity for citizenship and a tribal member chooses to so become a citizen is in itself insufficient to determine citizenship. In Cushing’s view, the effectiveness of such an action would have to be evaluated and a determination made regarding its effectiveness before the question of citizenship could be ascertained.

It may be ... competent for him to become a citizen ... *by ceasing to be a member of the tribe*. Be it so. Let him cease, then, to continue by his own volition and election an Indian. If, by some act of recognized [sic] legality,

he has manifested his desire to be considered a citizen, then it will have to be considered whether such act is effective... (Emphasis in original) (7 Op. Att’y Gen. 746, 752)

And how was “effectiveness” of the act of choosing citizenship over continued tribal affiliation to be determined? According to Attorney General Cushing, one would have to examine

Whether, for instance, it was performed in good faith, as in the case of alleged change of domicil [sic]; whether it is not contradicted by the party’s having in the mean time retained his tribal relations; whether, in a word, if of admitted capacity to become a citizen of the United States, he has in fact become such, by throwing off the *status* of Indian. (Emphasis in original) (7 Op. Att’y Gen. 746, 752-753)

In concluding his opinion, Attorney General Caleb Cushing raised the question of whether it was wise to continue such a public policy as currently existed regarding the legal distinctions between whites and Indians. In Cushing’s view:

As a question of public policy in the United States, it may be injudicious to seek to maintain the present legal distinction between the two races. But the distinction exists; it is broadly drawn by hundreds of treaties and statutes; it cannot be disregarded in the administrative construction and execution of the law of the land; and if to be obliterated, that can be done only by the treaty-making or the legislative powers of the Government. (7 Op. Att’y Gen. 746, 756)

*Civil rights act of 1866.*

The title for the congressional enactment of the Civil Rights Act of 1866 announced its purpose: “An Act to protect all persons in the United States in their civil rights, and furnish means for their vindication” (14 Stat. 27). According to the terms of the act, “All persons born in the United States and not subject to any foreign power, *excluding Indians not taxed*, are hereby declared to be citizens of the United States” (Emphasis added) (14 Stat. 427). For Supreme Court Justice John Marshall Harlan, the 1866 Civil Rights Act marked “the first general [legislative] enactment making persons of the Indian race citizens of the United States” (112 U.S. 94, 112). The 1866 Civil Rights Act differed from previous “statutes and treaties” that provided

citizenship opportunities for specific individuals and tribes (112 U.S. 94, 112). According to Justice Harlan, the Civil Rights Act of 1866 “reached Indians not in tribal relations” (112 U.S. 94, 112). He explained:

Surely ever one must admit that an Indian, residing in one of the States, and subject to taxation there, became, by force alone of the act of 1866, a citizen of the United States, although he may have been, when born, a member of a tribe. The exclusion of Indians not taxed evinced a purpose to include those subject to taxation in the State of their residence. (112 U.S. 94, 112-113)

In support of his interpretation of the 1866 Civil Rights Act, Justice John Marshall Harlan described and cited specific comments by senators in their debates preceding the bill’s enactment (See 112 U.S. 94, 113-114). Supreme Court Justice Harlan summarized the congressional intent as illustrated by the debate in Congress:

The entire debate shows, with singular clearness, indeed, with absolute certainty, that no Senator who participated in it, whether in favor of or in opposition to the measure, doubted that the bill, as passed, admitted, and was intended to admit, to national citizenship Indians who abandoned their tribal relations, and became residents of one of the States or Territories, within the full jurisdiction of the United States. (112 U.S. 94, 114)

Drawing attention to the fact that even the President of the United States agreed with the preceding interpretation of the Civil Rights Act’s purpose, Justice Harlan quoted the following from President Andrew Johnson’s veto message:

By the first section of the bill all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. This provision comprehends the Chinese of the Pacific States, *Indians subject to taxation*, the people called Gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes, and persons of African blood. Every individual of those races, born in the United States, is, by the bill, made a citizen of the United States. (112 U.S. 94, 114)

Basing his opinion upon a literal reading of the act’s language and upon the recorded debate in the United States Senate, Supreme Court Justice John Marshall Harlan concluded:



It would seem manifest, from this brief review of the history of the act of 1866, that one purpose of that legislation was to confer national citizenship upon a part of the Indian race in this country – such of them, at least, as resided in one of the States or Territories, and were subject to taxation and other public burdens. (112 U.S. 94, 114)

As will be shown in the discussion of the Court's ruling in *Elk v. Wilkins*, despite the acuity of his legal vision and the factual basis of his constitutional reasoning, Justice Harlan's legal opinion was not a view of American Indian citizenship shared by many Americans, let alone a majority of the Supreme Court.

*Fourteenth amendment to the u.s. constitution.*

Justice Harlan noted the congruence of the Civil Rights Act of 1866 with the Fourteenth Amendment: "At the same session of the Congress which passed the act of 1866, the Fourteenth Amendment was approved and submitted to the States for adoption. Those who sustained the former urged the adoption of the latter" (112 U.S. 94, 115). As with the Civil Rights Act, Justice Harlan examined the legislative record to discover congressional intent.

An examination of the debates in Congress, pending the consideration of that amendment, will show that there was no purpose, on the part of those who framed it or of those who sustained it by their votes, to abandon the policy inaugurated by the act of 1866, of admitting to national citizenship such Indians as were separated from their tribes, and were residents of one of the States ... outside of any reservation or territory set apart for the exclusive use and occupancy of Indian tribes. (112 U.S. 94, 115)

After examining congressional legislation granting citizenship to specific tribal members electing to pursue such a path, after describing congressional conversations about the issue of Indian citizenship, and after quoting specific remarks made on the floor of the U.S. Senate, Supreme Court Justice John Marshall Harlan observed:

But it was distinctly announced by the friends of the measure [the proposed Fourteenth Amendment] that they intended to include in the grant of national citizenship Indians who were within the jurisdiction of the States,

and subject to their laws, because such Indians would be completely under the jurisdiction of the United States. (112 U.S. 94, 117)

After recounting the discussions and difficulties with the phrase “Indians not taxed,” Justice

Harlan summarized his findings regarding congressional intent:

A careful examination of all that was said by Senators and Representatives, pending the consideration by Congress of the Fourteenth Amendment, justifies us in saying that every one who participated in the debates, whether for or against the amendment, believed that in the form in which it was approved by Congress it granted, and was intended to grant, national citizenship to every person of the Indian race in this country who was unconnected with any tribe, and who resided, in good faith, outside of Indian reservations... (112 U.S. 94, 118)

A little over a half-century later, Felix Cohen noted that the Fourteenth Amendment constituted the first congressional effort that “first defined federal citizenship” (Cohen, 1942/1971, p. 155). Cohen differed from Justice Harlan in attributing the differing congressional interpretations to the effects of the Fourteenth Amendment’s “effect on the Indians” (Cohen, 1942/1971, p. 155). Justice Harlan, on the other hand (as previously noted), focused on the differing interpretations of the phrase “Indians not taxed” as the major area of differing opinion (See 112 U.S. 94, 117-118, for Harlan’s discussion). Both Cohen and Justice Harlan noted the later action by the Senate Judiciary Committee on December 14, 1870, offering its opinion regarding the Fourteenth Amendment’s impact upon citizenship for American Indians.

According to Cohen, the Senate Judiciary Committee “conclud[ed] that the Indians did not attain citizenship by the Fourteenth Amendment” (Cohen, 1942/1971, p. 155, n. 33). In Cohen’s view, the purpose for the Senate Judiciary’s report was “to clarify its [the Fourteenth Amendment] effect” on American Indians (Cohen, 1942/1971, p. 155, n. 33). Cohen viewed the Judiciary Committee’s report as a link in a chain stretching from Attorney General Cushing’s report to *McKay v. Campbell* to the Court’s majority ruling in *Elk v. Wilkins* (Cohen, 1942/1971,

p. 155). Cohen's perspective was one of looking backward from *Elk v. Wilkins* as part of a larger assignment, that of

undertak[ing] the forbidding task of bring meaning and reason out of the vast hodgepodge of treaties, statutes, judicial and administrative rulings, and unrecorded practice in which the intricacies and perplexities, the confusions and injustices of the law governing Indians lay concealed. (Cohen, 1942/1971, p. v)

Harlan's perspective was more immediate, ascertaining the facts of a particular legal issue and applying the law in a reasoned manner in order to reach a particular set of legal conclusions.

Justice Harlan, it appears, examined the Senate Judiciary Committee's report in detail as he quoted several times from the report in his opinion. Based upon his examination, Justice Harlan arrived at a different purpose for the report than did Cohen. According to Justice Harlan: "The report was made in obedience to an instruction to inquire as to the effect of the Fourteenth Amendment upon the treaties which the United States had with various Indian tribes of the country" (112 U.S. 94, 118). Where Cohen saw the Judiciary Committee's purpose as one of ascertaining the effect of the Fourteenth Amendment in a general way upon American Indians, Justice Harlan viewed the Committee's purpose more specifically in terms of its impact upon the various treaties previously negotiated between the United States and the various tribal governments.

The Judiciary Committee did, however, address the issue of citizenship in determining whether or not the Fourteenth Amendment nullified the treaties with the Indian nations. Justice John Marshall Harlan cited two sections of the Committee's report. The first dealt with Indians who retained their tribal status. As can be seen from the cited section of the report, the Judiciary Committee viewed this as the critical issue in determining the impact of the Fourteenth Amendment upon Indian treaties.

[T]he Indian tribes within the limits of the United States, and the individuals, members of such tribes, while they adhere to and form a part of the tribes to which they belong, are not, within the meaning of the Fourteenth Amendment, “subject to the jurisdiction” of the United States; and, therefore, that *such* Indians have not become citizens of the United States by virtue of that amendment [the Fourteenth]; ... it follows that the treaties heretofore made between the United States and the Indians are not annulled by that amendment. (112 U.S. 94, 118-119)

According to the Judiciary Committee, American Indians who remained with their tribe and who functioned as tribal members were neither citizens of the United States nor were they “subject to the jurisdiction” of the United States (112 U.S. 94, 119). For Justice Harlan, however, the critical portion of the Judiciary Committee’s recommendation, which contained “significant language” in Justice Harlan’s view, remained the following:<sup>148</sup>

It is pertinent to say, in concluding this report, that treaty relations can properly exist with Indian tribes or nations only, and that, *when the members of any Indian tribe are scattered, they are merged in the mass of our people, and become equally subject to the jurisdiction of the United States.* (Emphasis in original) (112 U.S. 94, 119)

Viewed in light of these citations, members of Congress, both at the time the Fourteenth Amendment was considered and proposed and subsequently as members of the Senate Judiciary Committee, viewed the Fourteenth Amendment as bestowing American citizenship on Indians who had severed ties with their tribe and had removed themselves to the larger American society.

*McKay v. Campbell*, 16 Fed. Cas. 161 (D.C. Ore. 1871).<sup>149</sup>

*McKay v. Campbell* was referenced by the Court in its majority opinion in *Elk v. Wilkins* and by Cohen in his massive tome on American Indian law. Cohen viewed the decision by the federal judge of the District Court for the District of Oregon as a “reiterat[ion]” of the opinion offered by Attorney General Caleb Cushing in 1856 (Cohen, 1942/1971, p. 155). According to Cohen, *McKay v. Campbell* “shattered” any hopes “that a liberal interpretation [of the Fourteenth Amendment] would make Indians citizens” (Cohen, 1942/1971, p. 155). In light of the

congressional intent of the Fourteenth Amendment, convincingly illustrated by Justice Harlan's painstaking research, the question of liberality is no longer a question, but instead becomes a factual issue of congressional intent whereby the Fourteenth Amendment granted citizenship to nontribal American Indians.

Reading *McKay v. Campbell* is the equivalent of a history lesson. The plaintiff in the case was William McKay. He filed action against James Campbell, one of the judges of election in the East Dalles precinct in Wasco County, Oregon. Campbell refused to allow William McKay to vote because "he was not a citizen of the United States, but [instead] was a half-breed Indian" (16 Fed. Cas. 161, 162). Actually, the facts were somewhat more complex and required the Court to engage in extensive fact finding regarding the lineage of William McKay and the history of Oregon's settlement before commencing to interpret English & American common law, a series of agreements and treaties between Great Britain and the United States focused on the Oregon Territory, several congressional acts, previous Supreme Court decisions, and both the Fourteenth and Fifteenth Amendments to the Constitution. Finally, the actual grounds for the suit rested only indirectly upon the Fourteenth and Fifteenth Amendments. The law suit was technically filed

to recover a penalty of \$500, given by section 2 of an act of congress [sic] entitled "An act to enforce the rights of citizens of the United States to vote in the several states of the Union, and for other purposes," approved May 13, 1870 (16 Stat. 140). (16 Fed. Cas. 161)

William McKay's grandfather, Alexander McKay, "was born in Scotland, and emigrated to Canada, where he married Margaret Bruce, a woman having one fourth Indian blood" (16 Fed. Cas. 161, 162). In 1810, Alexander McKay joined John Jacob Astor's "American Fur Company" which departed from New York City "for the mouth of the Columbia river [sic]" (16 Fed. Cas. 161, 162). Alexander, taking both his wife and his thirteen-year-old son, Thomas,

traveled from Montreal to New York City in order to join the American Fur Company prior to its departure for the Oregon country. Alexander and his family made the journey from Montreal to New York “in a birch bark canoe, transporting it on a wagon across the portages between the St. Lawrence and the Hudson” (16 Fed. Cas. 161, 166). Shortly after their arrival in Oregon in 1811, Alexander McKay (William’s grandfather) perished with the ship, and Thomas McKay (William’s father) went to work for the “Northwest Fur Company, a corporation organized under the laws of Great Britain, having its principal office in Montreal,” (16 Fed. Cas. 161, 162). In 1821 the Northwest Fur Company merged with the Hudson Bay Company “by an act of parliament” and became the “Honorable Hudson Bay Company” (16 Fed. Cas. 161, 162). At an unspecified date, Thomas McKay (William’s father) “married a Chinook Indian woman, and the plaintiff was the issue of that marriage, born at Fort George (now Astoria), in 1823” (16 Fed. Cas. 161, 162). According to the federal district court judge’s determination, William McKay (the plaintiff in the case) was “seven sixteenths white and nine sixteenths Indian blood,” and he had “always lived in Oregon except from 1838 to 1843, while in the state of New York to obtain an education” (16 Fed. Cas. 161, 162). The federal district court also determined that “[n]either the plaintiff, nor his father, nor his grandfather McKay, were ever naturalized under the laws of the United States” (16 Fed. Cas. 161, 162). The court also determined that while William McKay (the plaintiff) had been born in 1823, the Oregon territory didn’t come under the jurisdiction of the United States until 1846 (16 Fed. Cas. 161, 163, 165).

The federal district court addressed William McKay’s claim that James Campbell had violated rights guaranteed by the Fourteenth and Fifteenth Amendments to the Constitution. Judge Deady of the Oregon Federal District Court cited a portion of the Fifteenth Amendment, which “provides that ‘the right of citizens of the United States to vote shall not be denied or

abridged ... on account of race, color, or previous condition of servitude” (16 Fed. Cas. 161, 165). Deady then cited Section 1 of the Fourteenth Amendment that states “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside” (16 Fed. Cas. 161, 165). According to Judge Deady, the Fourteenth Amendment that he had just cited “is nothing more than declaratory of the rule of the common law” (16 Fed. Cas. 161, 165). He continued:

To be a citizen of the United States by reason of his birth, a person must not only be born within its territorial limits, but he must also be born subject to its jurisdiction – that is, in its power and obedience. 16 Fed. Cas. 161, 165)

This passage was cited by both Cohen and the majority Court’s opinion in *Elk v. Wilkins*.

Legally, according to Judge Deady, William McKay (the plaintiff) was “[either] an American Indian, by virtue of his mother being a member of the Chinook tribe [sic], or [he was] a British subject ... by virtue of being the son of Thomas McKay, and his birth in the allegiance of the British crown” (16 Fed. Cas. 161, 166). Examining the issue of William McKay’s political status based upon his father, Judge Deady concluded that “the plaintiff was born of a British subject, in the allegiance of the British crown” (16 Fed. Cas. 161, 166). Judge Deady then examined the alternative claim based upon McKay’s mother’s political status under both the Fourteenth and Fifteenth Amendments. He cited Chief Justice John Marshall’s ruling in

*Worcester v. Georgia*:

But the Indian tribes within the limits of the United States have always been held to be distinct and independent political communities, retaining the right of self-government, though subject to the protecting power of the United States. *Worcester v. Georgia*, 6 Pet. [31 U.S.] 575. (16 Fed. Cas. 161, 166)

Nearing the conclusion of his opinion, Judge Deady couched his ruling in the guise of answers to questions he posed immediately preceding the judicial response. First, he addressed the issue from the political status of McKay’s mother in the form of a question:

Suppose that the plaintiff should be held to follow the condition of his mother, and is therefore a Chinook Indian; is he then a citizen of the United States under article 14 of the constitution [sic]? (16 Fed. Cas. 161, 167)

Judge Heady's answer followed immediately:

According to the doctrine that has been uniformly held in regard to the status of the Indian tribes in the United States he is not. Being born a member of "an independent political community" – the Chinook – he was not born subject to the jurisdiction of the United States – not born in its allegiance. (16 Fed. Cas. 161, 167)

Oregon Federal District Court Judge Heady next addressed the political status of McKay that flowed from his father followed by a conclusion addressing both parents' political status:

On the other hand, if the plaintiff is held to follow the condition of his father he is a Canadian of mixed blood, born in the allegiance of the British crown, and therefore a British subject. In neither case was he born a citizen of the United States, and can only become one by complying with the laws for the naturalization of aliens. (16 Fed. Cas. 161, 167)

Judge Heady concluded that since "the plaintiff was not a citizen of the United States," McKay could not "maintain this [court] action" and issued "judgment for the defendant [Campbell]" (16 Fed. Cas. 161, 167).

*Facts of elk v. wilkins.*

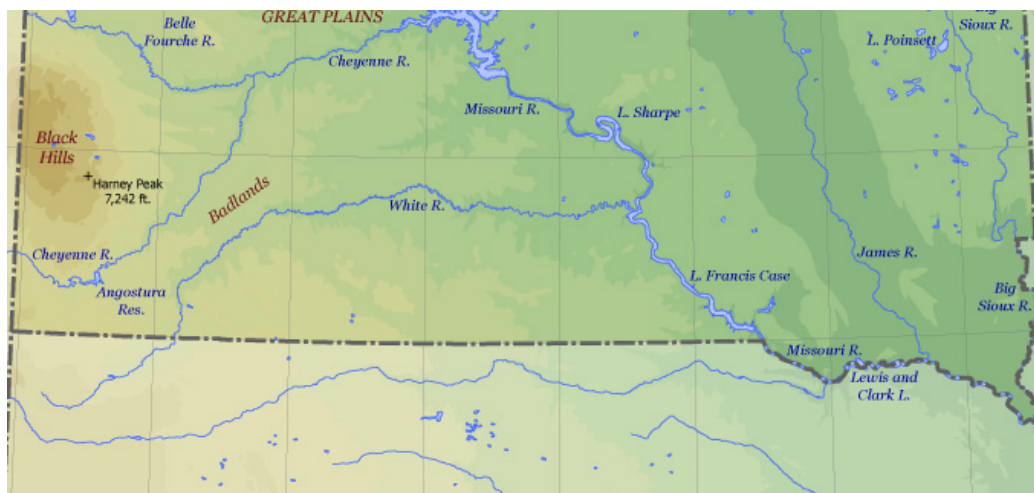
The historical facts embedded in the chain of events that eventually precipitated *Elk v. Wilkins* occurred long before the actual legal facts of the case. Twice Ponca homelands were ceded or transferred to other parties without Ponca tribal approval, a treaty guaranteeing the Ponca a homeland centered on the mouth of the Niobrara River was unilaterally broken by congressional authorization, the Ponca were forcibly removed without either their approval or agreement to the Indian Territory, a tribal faction journeyed back undetected to their homeland along the Niobrara in the dead of winter and were arrested while staying with their friends on the Omaha Reservation in Nebraska, and an early test of habeas corpus involving the issue of



citizenship appeared in *United States ex rel. Standing Bear v. Crook*. All of these events occurred within the lifetime of the plaintiff in *Elk v. Wilkins* before the case was even filed.

The first cession occurred with the Omaha Treaty of 1854 when Ponca lands near the Niobrara River were ceded by the Omaha (See previous Figure R1, #315 for the Ponca lands ceded by the Omaha) (National Park Service, U.S. Department of the Interior, *Standing Bear v. the United States* [hereafter cited as NPS, *Standing Bear*], Section “The Home Reservation, ¶ 1). The second occurrence involved Ponca lands being recognized as Sioux land by the United States. This first occurred in the Fort Laramie Treaty of 1851 which included part of the Ponca’s land within the “[b]oundaries of the Sioux or Dahcotah nation” (Royce, pp. 786-787 & 818-819).

*Figure R5*  
*Lakota-Ponca Battle for Land Between the White & Niobrara Rivers*

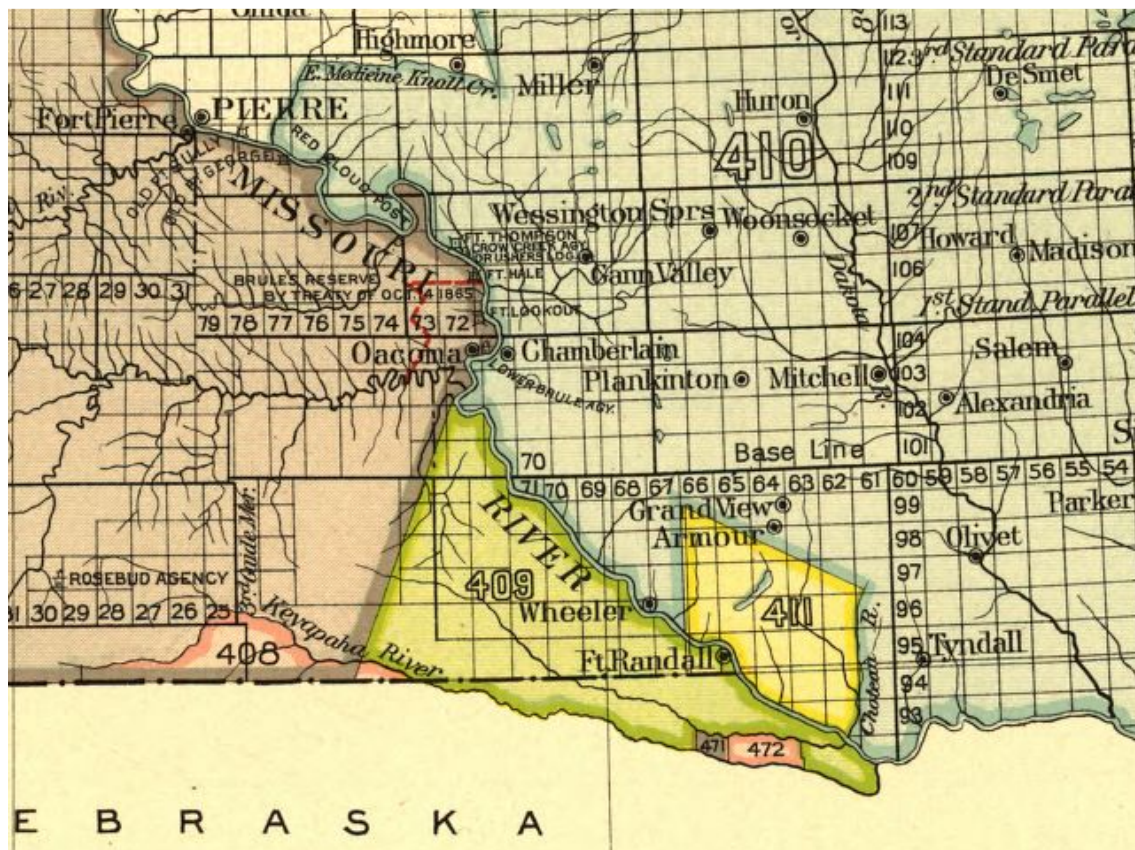


This same boundary served as the means whereby Ponca lands were included as part of “the Great Sioux Reservation” (NPS, *Standing Bear*, Home Reservation section, ¶ 4; Royce, pp. 786-787 & 818-819). The disputed ownership centered on the lands lying between the White River on the northern edge and the Niobrara River on the southern edge, beginning with each river’s source in western Nebraska and proceeding eastward through both Nebraska and South Dakota, ending where each river empties into the Missouri River on the east (See Figure R5 for map

indicating the Niobrara as Nebraska's northernmost east-west river and the White River as South Dakota's southernmost east-west river).<sup>150</sup> In actual fact, the Ponca had been driven out of the western and central portions of this area by the Lakota until they were located much closer to the Niobrara's confluence with the Missouri along the eastern edge of the territory (NPS, Standing Bear, Who Are the Ponca? section, ¶ 3-7).

In an 1858 treaty the Ponca ceded a large portion of their remaining land while reserving a smaller portion to serve as a reservation (See Figure R6, # 409 for the ceded portion; for the reserved portions, see Figure R6, #471 & #472, also located on the following page; for determination of map numbers identifying land ceded and reserved, see Royce, pp. 818-819).<sup>151</sup>

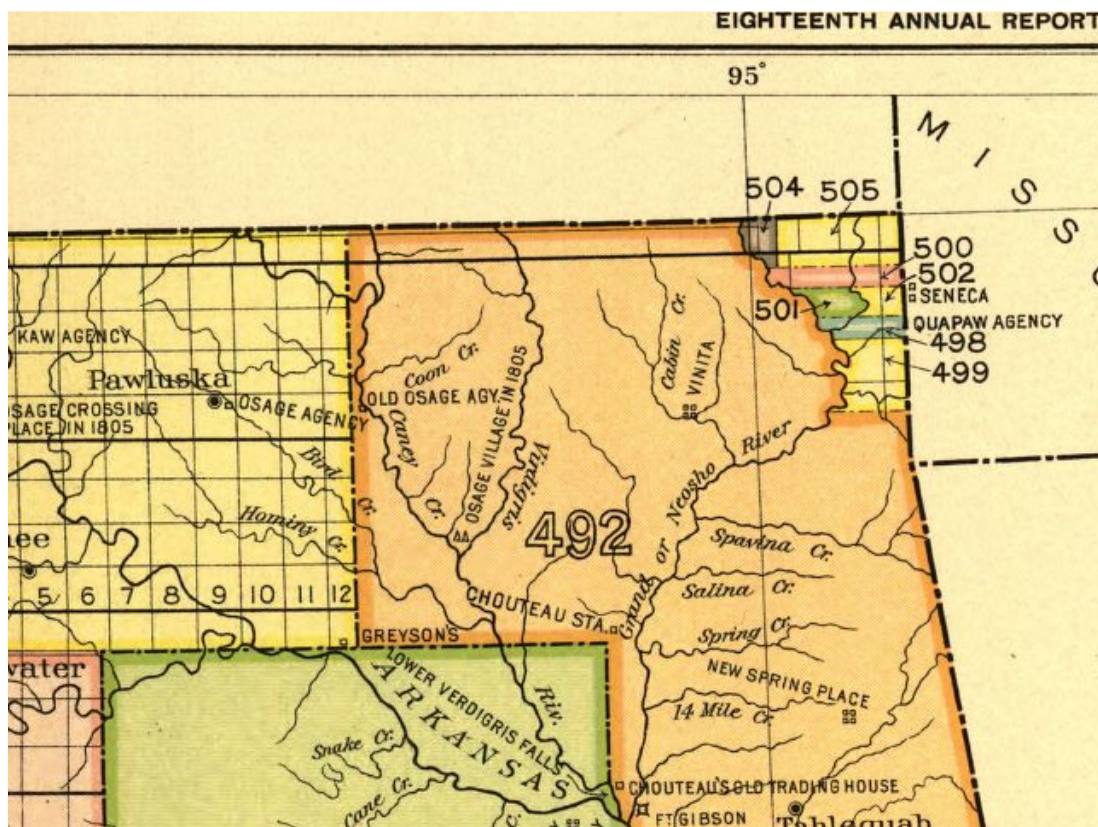
*Figure R6  
Ponca Lands Ceded & Reserved By the Treaty of 1858*



The lands reserved in 1858 received an additional guarantee by the United States that they would be reserved for the tribe in the Ponca Treaty of 1865 (Kappler, v. II, pp. 875-876). These Ponca lands, lying alongside the Niobrara River, constituted “a reservation of 95,000 acres” (Prucha, 1984, 1986, p. 183). It was the lands on this reserve that the U.S. Government “without consulting the Poncas” ceded “to the Sioux, the Poncas’ traditional enemies” in the Fort Laramie Treaty of 1868 with the Sioux (Prucha, 1984, 1986, p. 183).

What happened next was described by one historian as “a tragic instance of bureaucratic blundering and insensitivity” (Debo, p. 210). In August of 1876, Congress authorized the Department of the Interior to remove the Ponca from their lands in northeastern Nebraska to an undetermined location (NPS, Standing Bear, Relocation section, ¶ 2). In a subsequent

*Figure R7*  
*Ponca Removal to Quapaw Land in the Indian Territory, 1877*





congressional act dated March 3, 1877, it was determined that the Ponca were to be relocated on Quapaw land in the Indian Territory (Royce, pp. 888-889; see preceding Figure R7, # 504 & # 505 for the location of the Quapaw lands in what is today northeastern Oklahoma, these being the lands to which the Ponca were forcibly removed).<sup>152</sup> What happened next was graphically summarized:

The Poncas were not consulted; they first learned of the plan when an agent of the Indian Office came to them the following January to carry it out. They said they would rather die than to leave their homes. Their frantic protests to the government officials were ignored, and a detachment of twenty-five soldiers was sent to force their removal. (Debo, p. 210)

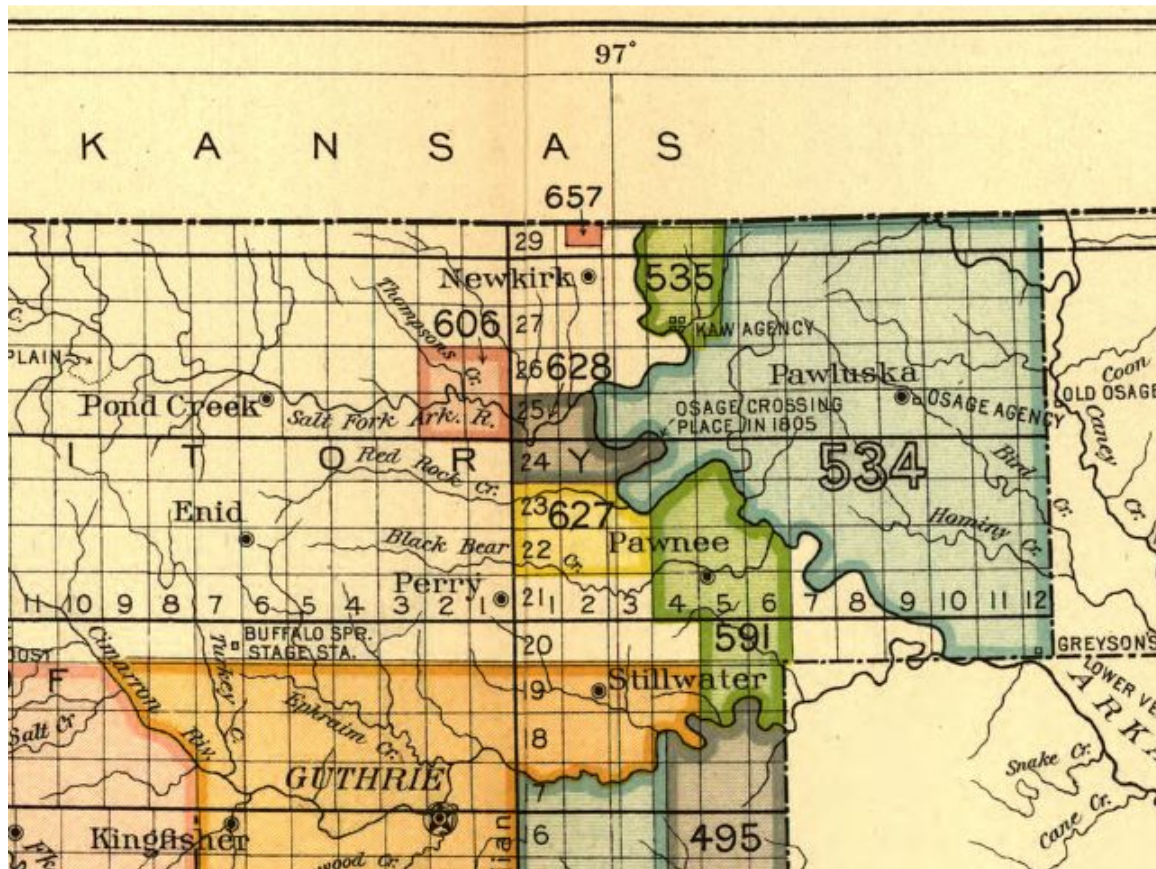
Debo continued her narrative of the Ponca's plight:

Thus, through persuasion and the threat of coercion, they started out, 681 persons led by their chief, Standing Bear. By this time it was summer, and their journey in the heat was a two months' disaster, with torrential rains, swollen rivers, and even a tornado. A number died on the way. No preparation had been made to receive them, and they continued to die, constantly begging for permission to return home. (Debo, p. 211)

Standing Bear's married daughter constituted one of the Ponca deaths on the trip to the Indian Territory (NPS, Standing Bear, Relocation section, ¶ 18; Debo, p. 211). The Ponca arrived at their new location without any farming equipment and little food. They had also arrived too late to be able to plant crops even if they possessed the equipment to do so. During the removal and within a year of its implementation, "one hundred and fifty-eight [Poncas] died" (25 Fed. Cas. 695, 698). By 1880, only about 400 Ponca remained alive (Poppleton & Webster, ¶ 13).

One year after arriving in the Indian Territory, Congress removed the Poncas to a new location "w of the Kaws" in Indian Territory (Royce, pp. 892-893) (See Figure R8, #628 for the new Ponca "homeland" in Indian Territory).<sup>153</sup> The winter following the tribe's move to a second location in the Indian Territory, Standing Bear lost his youngest son, Bear Shield, to disease (NPS, Standing Bear, Breaking Away section, ¶ 1; Debo, p. 211).

*Figure R8*  
*Poncas' Second Removal to a New Location in Indian Territory, 1878*



Having “promised his dying son that he would be buried among his ancestors in his native homeland on the Niobrara,” Standing Bear set out for the Ponca homelands in northeast Nebraska in the middle of winter on January 2, 1879 (NPS, Standing Bear, *Breaking Away* section, ¶ 2 & ¶ 4; see also Debo, p. 211). With Standing Bear went “eight men, six boys, and thirteen women & girls” (NPS, Standing Bear, *Breaking Away* section, ¶ 4). Avoiding towns and populated areas, they traveled undetected, reaching “the reservation of their friends and close relatives, the Omahas, in eastern Nebraska, where they received sympathy and asylum” in late February (Debo, p. 211; NPS, *Breaking Away* section, ¶ 6).

Learning of the Poncas' arrival at the Omaha reservation, Secretary of the Interior Carl Schurz ordered the arrest of Standing Bear and his band since they had left the Indian Territory without government permission (Debo, p. 211; NPS, Breaking Away section, ¶ 5 & ¶ 8). General Crook's "sympathy was all with the Indians, but he took them into custody" (Debo, p. 211). Based upon his experiences with the Indians (he had led troops in the field against the Apache, Paiutes, and Lakota), Crook "had come to oppose the government's Indian policy, but as a professional soldier and officer, considered it improper to speak out publicly" (NPS, Standing Bear, Breaking Away section, ¶ 10). General Crook's professionalism in carrying out orders with which he disagreed was noted by Federal District Court Judge Dundy in *United States ex rel. Standing Bear v. Crook*:

But I think it is creditable to the heart and mind of the brave and distinguished officer who is made respondent herein to say that he has no sort of sympathy in the business in which he is forced by his position to bear a part so conspicuous... (25 Fed. Cas. 695)

Subsequent to arresting Standing Bear, General Crook met with a local editor to enlist his help in fighting to prevent the return of Standing Bear and his band to the Indian Territory (NPS, Standing Bear, Breaking Away section, ¶ 11 & ¶ 12). The editor mounted an extensive campaign detailing the plight of the fugitive Poncas and recruited two Omaha attorneys to help Standing Bear fight the U.S. Government (NPS, Standing Bear, Breaking Away section, ¶ 17; NPS, New Battleground section, ¶ 1). After being advised by most of the attorneys in Omaha "that Indians had no rights," the editor talked to one of his friends from college, an attorney named John Lee Webster, who agreed to help (NPS, Standing Bear, New Battleground section, ¶ 1). Webster enlisted Andrew Jackson Poppleton, a "prominent Omaha citizen, eloquent speaker, accomplished attorney and chief counsel for the Union Pacific Railroad," to lead the legal battle (NPS, Standing Bear, New Battleground section, ¶ 1).

Planning “to file suit for a writ of habeas corpus against General Crook,” Poppleton and Webster met with General Crook to discuss the plan (NPS, Standing Bear, New Battleground section, ¶ 1 & ¶ 2). Crook was satisfied that serving the writ would legally block him “from obeying any orders from the Interior or War departments” to return Standing Bear and his band to the Indian Territory (NPS, Standing Bear, New Battleground section, ¶’s 2-4). On April 8, 1879, Poppleton and Webster petitioned the Federal District Court in Lincoln, Nebraska, claiming that confinement of American Indians by the U.S. Army violated the Due Process Clause of the Fourteenth Amendment (25 F. Cas. 695, ??). Judge Dundy read the petition and “issued the writ of habeas corpus that was served on Gen Crook later that day” whereupon “Crook promptly wired his commander, General Sheridan in Chicago” (NPS, Standing Bear, New Battleground section, ¶ 4; also see Debo, p. 211). The U.S. District Attorney received a message on April 10th “to appear for the United States to have the writ dismissed” (NPS, Standing Bear, New Battleground section, ¶ 5).

In *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (No. 14,891) (C.C.C. Neb. 1879), the “government argued that Indians were not ‘persons’ within the meaning of the Constitution, [i.e., they were not citizens] and thus were not eligible for the writ” (Debo, p. 211). Debo described the legal proceedings that began on May 1, 1879:

The trial was a dramatic occasion in a courtroom crowded with white sympathizers of the Poncas. Standing Bear spoke in his own defense with an eloquence that moved his hearers – including the presiding judge and General Crook – to tears. When he ended, the audience rose to its feet and cheered, and when the judge adjourned the court, all crowded around to shake his hand. (Debo, p. 211; see also NPS, New Battleground section, ¶’s 11-24)

On May 12th, the judge issued his ruling. Federal District Court Judge Dundy began by noting the political disparity of the two parties in the case, the Ponca and the U.S. Government:

On the one side, we have a few of the remnants of a once numerous and powerful, but now weak, insignificant, unlettered, and generally despised race; on the other, we have the representative of one of the most powerful, most enlightened, and most Christianized nations of modern times. (25 F. Cas. 695)

Judge Dundy continued:

On the one side, we have the representatives of this wasted race coming into this national tribunal of ours, asking for justice and liberty to enable them to adopt our boasted civilization, and to pursue the arts of peace, which have made us great and happy as a nation; on the other side, we have this magnificent, if not magnanimous, government, resisting this application with the determination of sending these people back to the country which is to them less desirable than perpetual imprisonment in their own native land. (25 F. Cas. 695)

Putting aside the sentiments that had been built up around the case, Judge Dundy observed:

But in a country where liberty is regulated by law, something more satisfactory and enduring than mere sympathy must furnish and constitute the rule and basis of judicial action. It follows that this case must be examined and decided on principles of law ... under the constitution or laws of the United States, or some treaty made pursuant thereto... (25 F. Cas. 695)

Beginning his analysis of the “questions of law” raised by the case, Federal District Court Judge Dundy addressed the government’s claim that the federal district court did not have the authority to issue the requested writ of habeas corpus. The federal district attorney based his claim upon reasons deriving from the “origin of the writ of habeas corpus and the character of the proceedings and practice in connection therewith in the parent country [England]” (25 F. Cas. 695, 696). Judge Dundy summarized the government’s argument:

It was claimed that the laws of the realm limited the right to sue out this writ to the free subjects of the kingdom, and that none others came within the benefits of such beneficent laws; and, reasoning from analogy, it is claimed that none but American citizens are entitled to sue out this high prerogative writ in any of the federal courts. (25 F. Cas. 695, 696)



Describing the “laws of a limited monarchy” as being “sometimes less wise and humane than the laws of our own republic,” Judge Dundy dismissed the government’s analogy as inappropriate because “whilst the parliament of Great Britain was legislating in behalf of the favored few, the congress of the United States was legislating in behalf of all mankind who come within our jurisdiction” (25 F. Cas. 695, 696). Citing three separate sections of “the Revised Statutes,” Judge Dundy concluded:

Thus, it will be seen that when a person is in custody or deprived of his liberty under color of authority of the United States, or in violation of the constitution or laws or treaties of the United States, the federal judges have jurisdiction, and the writ can properly issue. (25 F. Cas. 695, 696)

The fact that the Poncas were in the “custody of a federal officer, under color of authority of the United States,” met one of the requirements for the writ of habeas corpus outlined in the U.S. Revised Statutes (25 F. Cas. 695, 696).

Previously Judge Dundy had drawn attention to a Ponca treaty:

On the 8th of March, 1859, a treaty was made by the United States with the Ponca tribe of Indians, by which a certain tract of country, north of the Niobrara river [sic] and west of the Missouri, was set apart for the permanent home of the said Indians, in which the government agreed to protect them during their good behavior. (25 F. Cas. 695, 696)

Having determined that the Poncas met the first eligibility test for habeas corpus under congressional statute by virtue of being in federal custody, Judge Dundy next observed:

And they may be entitled to the writ under the other paragraph, before recited, for the reason, as they allege, that they are restrained of liberty in violation of a provision of their treaty, before referred to. Now, it must be borne in mind that the habeas corpus act describes applicants for the writ as “persons,” or “parties,” who may be entitled thereto. It nowhere describes them as “citizens,” nor is citizenship in any way or place made a qualification for suing out the writ. (25 F. Cas. 695, 696-697)

Having raised the issue of treaty violation as a justification for releasing the Ponca under a writ of habeas corpus because their federal detention violated the Ponca Treaty of 1859, Judge Dundy

next raised the issue of whether Indians were “persons” as referenced by U.S. law. Dundy never returned to the question of treaty violation in his opinion. Instead, he devoted attention to investigating whether or not Indians qualified for the requested writ. After noting Webster’s definition of “a person as ‘a living soul; a self-conscious being; a moral agent; especially a living being; a man, woman, or child; an individual of the human race,’” Dundy noted: “This is comprehensive enough, it would seem, to include even an Indian” (25 F. Cas. 695, 697). Judge Dundy continued, “I must hold, then, that Indians, and consequently the relators [the Poncas] are ‘persons,’ such as are described by and included within the laws before quoted” (25 F. Cas. 695, 697). The government had further argued that the federal district court “must be without jurisdiction” because “this is the first instance on record in which an Indian has been permitted to sue out and maintain a writ of habeas corpus in a federal court” (25 F. Cas. 695, 697). Judge Dundy retorted that the government’s argument was “a non sequitur,” and pointed out that “[p]ower and authority rightfully conferred do not necessarily cease to exist in consequence of long non-user” (25 F. Cas. 695, 697). Federal District Court Judge Dundy concluded:

I cannot doubt that congress [sic] intended to give to every person who might be unlawfully restrained of liberty under color of authority of the United States, the right to the writ and a discharge thereon. I conclude, then, that, so far as the issuing of the writ is concerned, it was properly issued, and that the relators [the Poncas] are within the jurisdiction conferred by the habeas corpus act. (25 F. Cas. 695, 697)

Having determined that the Poncas were eligible for the writ of habeas corpus and that the writ had been properly issued, Judge Dundy turned to the remaining legal issue, whether or not the federal government had acted in a lawful manner in detaining the Poncas. As described by Judge Dundy:

A question of much greater importance remains for consideration, which, when determined, will be decisive of this whole controversy. This relates to the right of the government to arrest and hold the relators [the Poncas] for a

time, for the purpose of being returned to a point in the Indian Territory from which it is alleged the Indians escaped. (25 F. Cas. 695, 697)

Dundy conducted “[a] review of the policy of the government adopted in its dealings with the friendly tribe of Poncas” by focusing upon the treaties and congressional acts centered on the Ponca Tribe (25 F. Cas. 695, 698). Following a somewhat lengthy review, instead of ruling on the detention of the Ponca as a treaty violation and thereby illegal under the rule of law whereby Article VI of the Constitution declared that the “Constitution,” the “Laws of the United States,” and “all Treaties” were to be considered “the supreme Law of the Land,” Judge Dundy focused on the procedural question inherent in the legal dispute. Dundy articulated what should have happened:

As General Crook had the right to arrest and remove the relators [the Poncas] from the Omaha Indian reservation, it follows, from what has been stated, that the law required him to convey them to this city and turn them over to the marshal [sic] and United States attorney, to be proceeded against in due course of law. Then proceedings could be instituted against them in either the circuit or district court... But this course was not pursued in this case... (25 F. Cas. 695, 700)

Federal District Court Judge Dundy continued:

I have searched in vain for the semblance of any authority justifying the commissioner [of Indian Affairs] in attempting to remove by force any Indians, whether belonging to a tribe or not, to any place, or for any other purpose than what has been stated.... In the absence of all treaty stipulations or laws of the United States authorizing such removal, I must conclude that no such arbitrary authority exists. (25 F. Cas. 695, 700)

The power of arrest, detainment, and removal are “war power[s] merely, and exist in time of war only,” according to Judge Dundy. He continued:

Every nation exercises the right to arrest and detain an alien enemy during the existence of a war, and all subjects or citizens of the hostile nations are subject to be dealt with under this rule. But it is not claimed that the Ponca tribe of Indians are at war with the United States, so that this war power might be used against them; in fact, they are amongst the most peaceable and friendly of all the Indian tribes, and have at times received from the

government unmistakable and substantial recognition of their long-continued friendship for the whites. (25 F. Cas. 695, 700)

Judge Dundy concluded:

If they [the Poncas] could be removed to the Indian Territory by force, and kept there in the same way, I can see no good reason why they might not be taken and kept by force in the penitentiary at Lincoln, or Leavenworth, or Jefferson City, or any other place which the commander of the forces might, in his judgment, see proper to designate. *I cannot think that any such arbitrary authority exists in this country.* (Emphasis added) (25 F. Cas. 695, 700)

After recapitulating his holdings, Judge Dundy concluded that the Poncas, having been “restrained of liberty under color of authority of the United States, and in violation of the laws thereof,” ordered that the Poncas “must be discharged from custody” (25 F. Cas. 695, 701).

Debo described the aftermath:

The friends of Indians hoped to carry the case to the Supreme Court for a final ruling, but the government shrank from appealing the decision. Standing Bear and his followers were released, and they went on to their old home [grounds on the Niobrara] and buried the boy [Standing Bear’s son] with tribal honors. (Debo, p. 211)

In point of fact, the government didn’t shrink from appealing the decision, at least according to the District Court’s records. In a note appended to the end of ruling by the Federal District Court for Nebraska, the following is stated:

At the May term, 1879, Mr. Justice Miller [of the U.S. Supreme Court] refused to hear an appeal prosecuted by the United States, because the Indians who had petitioned for the writ of habeas corpus were not present, having been released by the order of Dundy, District Judge, and no security for their appearance having been taken. (25 F. Cas. 695, 701)

But, then again, maybe both sources are correct in so far as they go in relating the matter of appeal. From the following account, it would seem that the federal district attorney appealed the case, it was heard, and then it was dismissed on a motion filed by the federal district attorney, maybe because he received orders from higher up in the chain of command.

The United States District Attorney took the case to the United States Circuit Court for the district by appeal and on May 19 at a hearing before Mr. Justice Miller Associate Justice of the Supreme Court of the United States was there continued and on June 5, 1880 the appeal was dismissed on a motion of the U.S. District Attorney. (Zimmerman, p. 225)

Another historian provides the remaining piece to the puzzle of what happened with the appeal of *United States ex rel. Standing Bear v. Crook*, confirming that the Secretary of the Interior directed that no appeal would be made. According to Father Prucha, “Schurz [Secretary of the Interior] quashed an attempt to carry the Standing Bear case to the Supreme Court...” (Prucha, 1984, 1986, p. 184).

Perhaps it is unfortunate that *United States ex rel. Standing Bear v. Crook* was not heard by the U.S. Supreme Court because the issue of noncitizens’ rights to file for a writ of habeas corpus arose once again in the aftermath of the attack on the World Trade Center in New York City on September 11, 2001, the U.S. invasion and occupation of Iraq, and the U.S. military campaign in Afghanistan. As the Federal Court for the District of Nebraska dismissed such arguments in 1879, so too did the U.S Supreme Court dismiss such arguments over one hundred years later in a series of cases decided between 2004 and 2008, with the last and most significant case being decided by a one-vote margin.<sup>154</sup> Or, perhaps after reading the Court’s decision in *Elk v. Wilkins* in the upcoming pages, the reader will conclude that it was just as well that the Court didn’t decide to hear *United States ex rel. Standing Bear v. Crook*, that it was more preferable to have the lower court ruling stand than to be overturned.

John Elk was a Ponca according to one source. According to another source John Elk was a Winnebago. One won’t find reference to Elk’s tribal affiliation in any of the court records. Nor will it be found in most of the accounts of *Elk v. Wilkins*, e.g., Cohen, Debo, Deloria, Prucha, etc. Nor will one find such information in the letter to *The New York Times*,

which was written by Elk's attorneys, Andrew J. Poppleton and John L. Webster (Poppleton & Webster, last paragraph). Since the severing of tribal relations constituted the basis of his claim for citizenship, perhaps Elk's tribal status as to the particular tribe in which he was born didn't seem important. Deloria and Wilkins do mention that *Elk v. Wilkins* "was brought by the same attorneys who had successfully handled *United States ex rel. Standing Bear v. Crook*," but they do not mention that John Elk was a Ponca (Deloria & Wilkins, p. 145). The case material found in the U.S. Reports makes only the following references to Elk and his situation without identifying his "former" membership in either the Ponca or the Winnebago Tribes: "an Indian," "he had severed his tribal relation to the Indian tribes," "[t]he plaintiff is an Indian ... and has severed his tribal relation to the Indian tribes," "a member of one of the Indian tribes within the United States," "John Elk, the plaintiff in error, is a person of the Indian race," "he had severed all relations with his tribe," "no longer a member of an Indian tribe," and "abandoning his tribe" (112 U.S. 94, 95, 98, 99, 110, 111, 122). The following account provides both the missing tribal affiliation and a summary of the facts of the case:

In 1884, ... the U.S. Supreme Court decided a case brought by a Ponca Indian named John Elk, who had voluntarily left his tribe where it had been relocated in the Indian Territory and moved to Nebraska. There he registered to vote and was refused by the Omaha city registrar because he was an Indian. His case was based on the equal protection clause of the Fourteenth Amendment... (Page, pp. 308-309)

No source was cited for the identification of John Elk as a Ponca. The assertion that John Elk was a Ponca is corroborated circumstantially by an earlier history of the Poncas. In citing Ponca efforts subsequent to *Standing Bear*'s trial to remedy the "displacement of the Ponca tribe through Government action," another writer included

the case of John Elk to determine the rights of an Indian under the Fourteenth amendment to the Constitution. The Indians had hoped an appeal would be taken so that a decision was or was not clothed with the

privileges of a citizen so that he could have a standing in a court of law.  
(Zimmerman, p. 226)

In light of the evidence presented thus far, John Elk as a Ponca appeared both correct and credible.

In addition, two later historians provided what seemed to be yet more corroboration for Elk's identification as a Ponca, an identification that seemed to make sense in light of all the facts, by discussing the *Standing Bear* and *Elk* cases in connection with Ponca hopes of addressing the wrongs done to them through government removal to the Indian Territory. The two university researchers noted that friends of the Ponca had hopes that a congressional bill declaring "Indians to be citizens" would help resolve "the battle waged by Standing Bear and his supporters" (Mathes & Lowitt, p. 170). However, upon a closer reading, these same two historians clearly identified John Elk as a Winnebago (Mathes & Lowitt, p. 169). Their index provided a page reference note under the heading for John Elk, which, when examined, provided source material the two historians had used for John Elk. An examination of the sources revealed the source used to identify Elk as a Winnebago, an article in a historical journal by a college researcher whose work "was funded in part by a Marycrest College Dean's Faculty Research Grant" (Bodayla, p. 379). Furthermore, the editors of the historical journal identified the college researcher as the "chairman of the History Department and Pre-Law Coordinator at Marycrest College in Davenport, Iowa" who had "received his doctorate from New York University" (p. 424). The cited source [Bodayla], in turn, provided documentation illustrating Elk's connection with the Ponca cause to obtain justice. According to the college researcher whose work was examined, found credible, and cited by two university historians, "Elk was a Winnebago Indian who had resided among whites in Omaha, Nebraska, for more than year" before "he attempted to register to vote" (Bodayla, p. 373). The connection between the Poncas

and *Elk v. Wilkins* was also examined with the following conclusions drawn and evidence presented.

It appears probable that the so-called “Ponca Committee,” formed in 1879 by T.H. Tibbles (editor of the *Omaha Herald*) to oppose the forced removal of the Ponca Indians from their reservation in Dakota to the Indian Territory, provided financial assistance and advice for Elk’s suit. The law firm which represented Elk had earlier been involved in the Ponca case, *Standing Bear v. Crook*. (Bodayla, p. 375)

As a result, the evidence from credible college and university researchers appears to be convincing that John Elk was a Winnebago who had renounced his tribal affiliation when he moved to Omaha to live and work.

Exactly what drove John Elk to renounce his tribal affiliation remains unknown to history, at least unknown to any of the histories examined by the writer. Elk would have been a tribal member when the Ponca lost their tribal lands to the Sioux, when the Ponca were being ineffectively protected by the U.S. from attacks by the Sioux, and when the Ponca were removed to the Indian Territory by the U.S. Government, and when yet again the Ponca were moved to a new location within a year of the initial removal. Elk would certainly been aware of his own tribe’s relocation from Wisconsin to Iowa to Nebraska. Otherwise, Elk would not have been an adult who had attained the voting-age requirements in order to try to vote in Omaha when he did. One can only surmise that, based upon his own personal experiences, John Elk justifiably concluded that existence as a tribal member constituted a too hazardous proposition for ones well-being.

*Legal reasoning of elk v. wilkins.*

Elk’s attorneys presented information that Elk had severed relations with his tribe “more than one year prior to the grievances hereinafter complained of,” that he “had been a *bona fide* resident of the State of Nebraska,” that he “had been a *bona fide* resident of Douglas County,



wherein the City of Omaha is situated,” and that Elk “was in every way qualified, under the laws of the State of Nebraska and of the city of Omaha, to be registered as a voter” (112 U.S. 94, 95). In other words, John Elk had left his tribe, had relocated himself to a city that was removed from his tribe, had secured himself a job, had paid taxes, and was a member of the state militia. In every respect he had placed himself under the jurisdiction of local, state, and federal laws (112 U.S. 94, 110-111). Furthermore, Elk met the age, gender, and residence qualifications to be a voter in the City of Omaha, County of Douglas, State of Nebraska (112 U.S. 94, 110). In attempting to register to vote as specified by law, Elk had been refused by Charles Wilkins, the “registrar in the fifth ward of [Omaha]” because “plaintiff was an Indian” (112 U.S. 94, 96). Attorneys for Elk stated “that, under and by virtue of the Fourteenth Amendment to the Constitution of the United States, he is a citizen of the United States, and entitled to the right and privilege of citizens of the United States” (112 U.S. 94, 95). Being a citizen because of the Fourteenth Amendment, Elk, by virtue of the Fifteenth Amendment, “was entitled to exercise the elective franchise, regardless of his race and color” (112 U.S. 94, 96). The attorney for Wilkins argued that the original lower court action sustaining “a general demurrer” because the facts of the case were not “sufficient to constitute a cause of action” in that Elk was not a citizen of the United States by virtue of being an Indian (112 U.S. 94, 96-97).

One historian viewed *Elk v. Wilkins* as “[o]ne of the key cases regarding the civil rights of Indians residing off the reservation” (Deloria, 1971, p. 129). Another historian viewed the subject matter of *Elk v. Wilkins* as clearing up questions about “the citizenship status of Indians who voluntarily severed their connections with their tribes and took up the ways of white society. Did they, by such an act, automatically receive citizenship” (Prucha, 1984, 1986, p. 231)?

A knowledgeable observer, i.e., familiar with both Attorney General Cushing's opinion of 1856 regarding Indian citizenship and with the Oregon federal district court's ruling in *McKay v. Campbell*, would have known after reading the first four paragraphs of the majority Court's opinion how the Court would rule in *Elk v. Wilkins*. The final two concluding sentences of the fourth paragraph read:

Though the plaintiff alleges that he "had fully and completely surrendered himself to the jurisdiction of the United States," he does not allege that the United States accepted his surrender, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen, by the State or by the United States. Nor is it contended by his counsel that there is any statute or treaty that makes him a citizen. (112 U.S. 94, 99)

The two salient points, according to the Court, emerged as a negative image seen only in relief against pre-existing expectations in terms of: a) the lack of any official action by any federal official regarding Elk's citizenship; and b) the lack of any official action by the federal government itself in the form of either a treaty or a congressional act.

Prucha summarized the Court's ruling in *Elk v. Wilkins*:

The majority of the court held against the plaintiff, declaring that an Indian who was born a member of an Indian tribe, although he voluntarily separated himself from the tribe and took up residence among white citizens, was not thereby a citizen of the United States. Some specific act of Congress was necessary to naturalize him. (Prucha, 1984, 1986, p. 231)

Cohen viewed *Elk v. Wilkins* as sustaining the view "that the [Fourteenth Amendment] was merely declaratory of the common-law rule of citizenship by birth and that Indians born in tribal allegiance were not born in the United States and subject to the jurisdiction thereof," a view that had been first put forth by Attorney General Cushing in 1856 that had received support from a lower federal court ruling in *McKay v. Campbell* (Cohen, 155).

The Court majority, affirming the judgment of the lower federal court in *Elk v. Wilkins*, simply stated, "The plaintiff, not being a citizen of the United States under the Fourteenth

Amendment of the Constitution, has been deprived of no right secured by the Fifteenth Amendment, and cannot maintain this action” (112 U.S. 94, 109).

*Dissenting opinion in elk v. wilkins.*

Justice John Marshall Harlan dissented and authored a dissenting opinion which blistered the Court’s majority opinion through the use of sound legal reasoning. Justice Harlan was joined by Justice Woods. As can be seen from the following two citations, Justice Harlan would have agreed with Deloria’s assessment of the Court’s reasoning in *Elk v. Wilkins*. Deloria, a Standing Rock Sioux author, attorney, and theologian,<sup>155</sup> characterized the majority Court’s decision and its impact as follows:

The court was anxious to deny Elk citizenship. To do so it had to twist a series of treaties, statutes, and their citizenship provisions beyond recognition. But it found, nevertheless, that an Indian could not of his own power become a citizen of the United States – even if federal law appeared to say that he could. The Indians who had followed the directions of the United States and severed their tribal ties thus became men without a country. (Deloria, 1971, p. 129)

Although Justice Harlan’s language was not as blunt as Deloria’s, his meaning was similar:

It seems to us that the Fourteenth Amendment, in so far as it was intended to confer national citizenship upon persons of the Indian race, is robbed of its vital force by a construction which excludes from such citizenship those who, although born in tribal relations, are within the complete jurisdiction of the United States. (112 U.S. 94, 120)

Justice Harlan continued:

There were, in some of our States and Territories at the time the amendment was submitted by Congress, many Indians who had finally left their tribes and come within the complete jurisdiction of the United States. They were as fully prepared for citizenship as were or are vast numbers of the white and colored races in the same localities. (112 U.S. 94, 120)

Commenting upon the majority Court’s interpretation of the Fourteenth Amendment, Justice Harlan remarked:

Our brethren, it seems to us, construe the Fourteenth Amendment as if it read: “All persons *born subject* to the jurisdiction of, or naturalized in, the United States, are citizens of the United States and of the State in which they reside;” whereas the amendment, as it is, implies in respect of persons born in this country, that they may claim the rights of national citizenship from and after the moment they become subject to the complete jurisdiction of the United States. (Emphasis in original) (112 U.S. 94, 121)

Justice John Marshall Harlan even cited his namesake’s ruling in *Cherokee Nation v. Georgia* to demonstrate the mistaken legal reasoning used by the Court’s majority. As cited by Justice Harlan, Justice John Marshall, describing the situation of tribal Indians in their relation to the United States, flatly stated that tribal members were under the jurisdiction of the United States:

In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our citizens. (112 U.S. 94, 122)

Justice Harlan began the concluding paragraph of his dissenting opinion by describing John Elk’s factual claim to citizenship.

Born, therefore, in the territory under the dominion, and within the jurisdictional limits of the United States, plaintiff has acquired, as was his undoubted right, a residence in one of the States, with her consent, and is subject to taxation and to all other burdens imposed by her upon residents of every race. (112 U.S. 94, 122)

Justice Harlan next drew attention to the Court’s failure to properly apply to the facts of the case what Congress had intended to accomplish with the Fourteenth Amendment.

If he [John Elk] did not acquire national citizenship on abandoning his tribe and becoming, by residence in one of the States, subject to the complete jurisdiction of the United States, then the Fourteenth Amendment has wholly failed to accomplish, in respect of the Indian race, what, we think, was intended by it... (112 U.S. 94, 122)

In conclusion, Justice Harlan pointed to the consequences of the Court’s failure to properly interpret the Fourteenth Amendment.

[As a result of the majority Court's decision], there is still in this country a despised and rejected class of persons, with not nationality whatever; who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the States, to all the burdens of government, are yet not members of any political community nor entitled to any of the rights, privileges, or immunities of citizens of the United States. (112 U.S. 94, 122-123)

The situation would not be fully remedied in a legal sense for another forty years by the passage in 1924 of the Indian Citizenship Act.

In *Elk v. Wilkins* the majority of the Court's justices took what may be described as a minimalist approach that prefers to "embrace tradition uncritically because [the justices] believe history has achieved a kind of wisdom, slowly over many years, that contemporary critics might be unable to appreciate" (Dworkin, p. 29). Professor Dworkin<sup>156</sup> described the application of such a minimalist approach to twentieth-century government regulation, but if one substitutes "denial of voting rights" or "denial of citizenship for American Indians" in place of "form of government regulation," Dworkin's description applies to the Court majority in *Elk v. Wilkins*.

According to Dworkin:

Some justices have adopted that form of minimalism [an uncritical embrace of tradition] in due process cases: they refuse to declare any form of government regulation an unconstitutional infringement of liberty if – like the prohibition against doctor-assisted suicide – that regulation is long established. (Dworkin, p. 29)

Minimalism is also associated with the view expressed most recently by the current Chief Justice of the Supreme Court, John Roberts, who observed "that 'if it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more'" (Dworkin, p. 29). Dworkin talked about the costs of taking a minimalist approach judicially. According to Dworkin, "Minimalism often has serious costs, however, particularly when important constitutional rights are at stake,..." (Dworkin, p. 29). He provided examples from the Court's history regarding long

established practices to illustrate his point citing “segregating public schools by race, allowing prayer in public schools, forbidding mixed-race marriages, capital punishment, and failing to recognize same-sex marriages” (Dworkin, p. 30). The danger in following a strictly minimalist philosophy of interpreting the Constitution arises in a justice’s duty “as a guardian of the rights [protected by the Constitution]” (Dworkin, p. 30).

Dworkin also pointed to the dangers of another facet of a strictly minimalist approach. First, he cited a current minimalist view, which states, “If some legal practice has been long established, it should be changed only by a fresh decision of democratically elected legislators, not unelected judges” (Dworkin, p. 30). Then Dworkin offered his critique of this argument by citing a current law professor’s view:

As Sunstein [Cass Sunstein, Professor of the Harvard Law School and former faculty colleague of Barack Obama at the University of Chicago Law School, who was recently appointed by President Obama to head the Office of Information and Regulatory Affairs]<sup>157</sup> observes, it begs the question by assuming that democracy, properly understood, means only government by the will of the majority from time to time. (Dworkin, p. 30)

Dworkin [and Sunstein] countered the minimalist view of democracy by citing the Constitution’s view of democracy:

The Constitution plainly assumes a different conception of democracy: a partnership in self-government in which majority rule is deemed fair only if the basic rights of all citizens are protected. If a justice assumes that the right to be treated as an equal in matters of race or sexual preference is among these democratic preconditions, then he protects rather than subverts democracy by enforcing that right. (Dworkin, p. 30)

In reading Justice Harlan’s dissenting opinion, it is only too apparent that his views correspond with what Dworkin and Sunstein cite as the Constitution’s view of democracy. It is also plain that the majority of the Court in *Elk v. Wilkins* was searching for some way to sustain the 19th century views of citizenship for American Indians. Congress, through its discussion and

enactment of the Civil Rights Act of 1866 and the Fourteenth Amendment, clearly provided the opportunity for the Court to do its constitutional duty, that of protecting basic constitutional rights. Instead the Court majority ignored the literal statements of both congressional enactments, not to mention the comments made by legislators, and forced a Procrustean fit of facts and law whereby the case could be dismissed for a lack of standing by the original plaintiff in the case, a procedure that met with popular approval because it accorded with the views of most Americans at the time. The Court majority focused on the line of reasoning developed in an opinion by Attorney General Caleb Cushing and a lower federal court ruling in *McKay v. Campbell*, neither one of which paid any attention to the congressional intent as ascertained by the actual statements made by the legislators when debating both the Civil Rights Act of 1866 and the Fourteenth Amendment. By ignoring congressional intent and focusing on legal reasoning that was invalidated by the unconsidered congressional intent, the Court's majority reached a decision that seemingly rested upon precedent and also agreed with popular views at the time. Unfortunately, the Court ignored its constitutional duty.

***Citizenship/tribal sovereignty – The Kansas Indians, 72 U.S. 737 (1866).***

As noted by one authority, the issue of assimilation provided an underpinning for the legal facts in the next Court ruling regarding tribal sovereignty. According to Vine Deloria, Jr., a noted author, legal scholar, and enrolled member of the Standing Rock Sioux Tribe:

The question of assimilation was raised comparatively early in the history of the United States. After the Shawnees, Miamis and Weas had moved to Kansas from their ancestral homes in the Ohio valley they settled down and made the necessary adjustments to life on the western plains. In many ways they lived no differently than did the white settlers of Kansas. They farmed, owned homes, attended social functions, read newspapers, and generally mingled with their white neighbors. In nearly every aspect, then, they lived like the typical citizen of Kansas. (Deloria, 1971, p. 65)

Because the tribal members “were so well-merged with the other citizens of Kansas the state decided that they no longer had any special rights as members of their respective tribes” (Deloria, 1971, p. 65). Based on this determination, Kansas then decided “that it could levy taxes and execute judgments against the lands of the tribal members” (Deloria, 1971, p. 65). The preceding state decisions and actions were challenged in the county and state courts of Kansas. *The Kansas Indians* actually consists of three “distinct” and separate cases of the Shawnee, Miami, and Wea Nations that wended their way through the county courts of Kansas and the Supreme Court of Kansas before reaching the U.S Supreme Court where, because they involved “essentially the same question,” were combined into a single Supreme Court decision (72 U.S. 737). The legal question, according to the Court, consisted of the following:

[W]hether the State of Kansas had a right to tax lands in that State held in severalty by individual Indians of the Shawnee, Wea, and Miami tribes, under patents issued to them pursuant to certain treaties of the United States; the tribal organization of these tribes having to a certain extent ... been broken in upon by their intercourse with the whites, in the midst of whom the Indians were... (72 U.S. 737, 737-738)

A modern-day tribal member, attorney, and history professor summarized the critical issues somewhat differently by shifting the figure-ground relationships:

At issue was the right of the states to determine who was and who was not an Indian and whether or not a tribe existed or had to exist in a way of life radically differently than other citizens. Do treaties simply fade away by acculturation of the members of the tribe? (Deloria, 1971, p. 65)

In *The Kansas Indians*, the Court reaffirmed federal supremacy in governmental dealings with the Indian nations and reemphasized the importance of treaties as both a recognition and a source of Indian rights and sovereignty. Even though the federal policy had been successful in inducing the tribes to adopt the ways of Euro-American society (a development that the Supreme Court of Kansas relied upon for its decision), tribal existence continued, according to the United



States Supreme Court. The nation's high court rejected the state high court's contention that since the tribal members had adopted "the habits and modes of life of their fairer-skinned neighbors, and are, and have been for years, thrifty, substantial, industrious husbandmen," and because the "farms of the whites are interspersed more or less among these Indian lands," the tribes no longer existed (72 U.S. 737, 748, 743). The Kansas Supreme Court used the foregoing as the basis for their decision upholding the extension of state laws over Indian land, even arguing that the situation in Kansas differed from that contemplated by the Court in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*. The distinction, according to the Kansas Supreme Court, was that the Marshall Court contemplated Indian Country "as occupying exclusively a district of country," with "the Indian Territory as [being] completely separate from that of the States" (72 U.S. 737, 750). The Kansas Supreme Court noted: "The Shawnees do not hold their lands in common, nor are they contiguously located. It is difficult to conceive of a national existence without a national domain upon which to maintain it" (72 U.S. 737, 750).

As noted previously, the U.S. Supreme Court rejected the arguments used by the state judiciary of Kansas. The Court, having presented the legal question presented by the three cases, began by pointing state authorities to the proper sources:

The solution of it [the legal question] depends on the construction of treaties, the relations of the general government to the Indian tribes, and the laws of Congress. In order to [arrive at] a proper understanding of the rights of these Indians, it is necessary to give a short history of some of the treaties that have been made with them. (72 U.S. 737, 752)

And then, the Court began to model for the lower state courts what they should have done and how they should have proceeded. Later, having reviewed the extensive history of the Shawnee Nation, having described the multiple treaties, and having detailed specific provisions and congressional acts, the Court declared, "As long as the United States recognizes their national

character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws” (72 U.S. 737, 757). After reviewing the Wea Treaty of 1854, the Court similarly declared, “It is sufficient to say, that it leaves the Indians most clearly under the protection of the general government, and withdraws their property from the jurisdiction of Kansas” (72 U.S. 737, 759). And finally, addressing the legal action brought by the Miamis, the Court declared:

It is unnecessary to pursue the history of this tribe through the various treaties which have been concluded between them and the United States. It is sufficient to state that they are a nation of people, recognized as such by the general government in the making of treaties with them, and the relations always maintained towards them, and cannot, therefore, be taxed by the authorities of Kansas. (72 U.S. 737, 760)

Regarding the Miamis, the Court focused attention on a unique provision in the Miami Treaty of 1854 by which Miami lands were exempted from “levy, sale, execution, and forfeiture” (72 U.S. 737, 760). This constituted the only part in the Court’s decision whereby the Court referenced either of the two landmark Cherokee cases. In this instance, the Court referenced Chief Justice John Marshall’s statements in *Worcester v. Georgia* regarding the “enlarged rules of construction ... adopted in reference to Indian treaties” (72 U.S. 737, 760). Marshall’s statement in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832) used by the Court in 1866 was:

The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of their treaty. (72 U.S. 737, 760)

Employing Marshall’s rule of interpreting treaties, the Court determined that the exemption of Miami lands also prevented Miami lands “from a levy and sale for taxes, as well as the ordinary

judicial levy and sale” (72 U.S. 737, 761) In other words, Miami lands could neither be seized nor be sold for nonpayment of taxes.

The Court’s record of the opinion in *The Kansas Indians* concluded by reversing all three state high court decisions: “The judgment of the Supreme Court of Kansas in all three cases was REVERSED, and the causes remanded, with directions to enter a judgment in conformity with the opinions above given in the several cases” (Emphasis in original) (72 U.S. 737, 761). While not spelling out exactly the position of the tribes in American government, *The Kansas Indians* decision indicated that the various Indian nations in America occupied a position in between the state and federal levels of government. As viewed by a Twentieth Century tribal activist, “‘The Kansas Indians’ has been a major case supporting the rights of Indian tribes to maintain themselves as a distinct community over and above the changing legal doctrines of states’ rights” (Deloria, 1971, p. 65).

***Citizenship/tribal sovereignty – Ex Parte Crow Dog, 109 U.S. 556 (1883).***

A person’s perspective determines ones viewpoint of the case *Ex Parte Crow Dog*. From a tribal perspective, *Ex Parte Crow Dog* “marks the beginning of the intrusion of the United States Government into the internal domestic affairs of the Sioux Nation” (Deloria, 1971, p. 154). From a legal perspective, *Ex Parte Crow Dog* represents “[a]n extreme application of the doctrine of tribal sovereignty” (Cohen, 1942/1971, p. 125). In a legal analysis of “the basic doctrine of tribal sovereignty,” *Ex Parte Crow Dog*

contributes not only an intimation of the vast and important content of criminal jurisdiction inherent in tribal sovereignty, but also an example of the consistent manner in which the United States Supreme Court has opposed the efforts of lower courts and administrative officials to infringe upon tribal sovereignty and to assume tribal prerogatives without statutory justification. (Cohen, 1942/1971, p. 125)

From an historical perspective, *Ex Parte Crow Dog* emphasized “the question of a criminal code for the reservations” in which “even a murderer could not be punished” (Prucha, 1984, 1986, p. 229).

The facts of the case stem from Lakota tribal life. Succinctly summarized by a Twentieth-century Lakota, the facts were as follows:

A longstanding feud had developed between Spotted Tail, chief of the Brulé Sioux at the Rosebud Agency, and Crow Dog, one of the tribal members. Lying in wait for spotted Tail, Crow Dog killed him one day while the chief was out riding on the reservation. Although the usual tribal amenities were observed when the public discovered that the murderer was not to be executed, a great outcry against the savagery of the Sioux arose. (Deloria, 1971, p. 153)

The “usual tribal amenities” to which Deloria referred was considered to be “blood-money for the slaying” which was sometimes how murder was settled by Lakota tribal custom (Hyde, p. 65). In this particular instance, peacemakers from the “Crow Dog faction” offered “six hundred dollars, a number of ponies, and some other articles in payment” which was accepted by the family of Spotted Tail (Hyde, p. 64). To avert further trouble, tribal leaders convinced Crow Dog “into submitting to arrest,” after which he was “taken by Indian police to Fort Niobrara in northern Nebraska and placed in the guardhouse” to await trial “at Deadwood in the Black Hills in 1882” (Hyde, p. 65). Subsequently sentenced to death by “the first Judicial District [Court]” of “the Territory of Dakota” following his conviction for Spotted Tail’s murder in tribal territory, a judgment that was subsequently “affirmed, on a writ of error, by the Supreme Court of the Territory,” Crow Dog petitioned the U.S. Supreme Court “for writs of habeas corpus and certiorari” (109 U.S. 556, 557). Crow Dog’s petition claimed

that the crime charged against him, and of which he stands convicted, is not an offence [sic] under the laws of the United States; that the district court had no jurisdiction to try him, and that its judgment and sentence are void. (109 U.S. 556, 557).

Based on the preceding pleadings, Crow Dog “prays for a writ of habeas corpus, that he may be delivered from an imprisonment which he asserts to be illegal” (109 U.S. 556, 557).

In its arguments for asserting federal jurisdiction over the Brulé Lakota, the U.S. Government relied upon two justifications. The first justification rested upon twisting the interpretation of language contained in the 1868 Fort Laramie Treaty with the Sioux in an attempt to make it fit the U.S. Revised Statutes sections covering criminal acts in the United States Territories, a justification refuted by the Court (109 U.S. 556, 562-568). The second justification rested upon language in “the eighth article” of a subsequent (1877) agreement between the United States and the Sioux (109 U.S. 556, 568). The eighth article of the 1877 Sioux Agreement stated, “And Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life” (109 U.S. 556, 568). The Court also refuted the second argument put forth by federal officials, declaring that “the highest” aspect of “an orderly government” was that of “self-government” (109 U.S. 556, 568). According to the Court:

The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, ... necessarily implies, ... that among the arts of civilized life, ... was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs. (109 U.S. 556, 568)

In concluding its opinion, and immediately prior to delivering its judgment, the Court cited a previous Supreme Court ruling in which the Court observed:

The tribes for whom the act of 1834 [the Indian Trade and Intercourse Act of 1834]<sup>158</sup> was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within

or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the governments, State and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals. *United States v. Joseph*, 94 U.S. 614, 617. (109 U.S. 556, 572)

In granting the “writs of habeas corpus and certiorari,” the Court found “that the First District Court of Dakota was without jurisdiction to find or try the indictment against the prisoner, that the conviction and sentence are void, and that his imprisonment is illegal” (109 U.S. 556, 572).

***Citizenship/tribal sovereignty – Major crimes act of 1885, 23 stat. 362, 385, § 9.***

Following the Court’s ruling in *Ex Parte Crow Dog*, the next session of Congress attached a rider to an appropriation bill “establishing seven major crimes that, when committed by one Indian against another, would become federal crimes transcending Indian jurisdiction” (Deloria, 1971, p. 154). Deloria described the nexus between *Ex Parte Crow Dog* and the ensuing congressional action:

So the Sioux actually won this case, but Congress was so enraged at their initial failure to superimpose the Anglo-Saxon concepts of vengeful justice, that they promptly initiated legislation which would deny the tribes jurisdiction over any major crimes committed by Indians against Indians. (Deloria, 1971, p. 154)

According to Deloria’s view of the congressional reaction, “In doing so the white idea of vengeance replaced the Indian idea of compensation as the ideology behind punishment for a capital offense” (Deloria, 1971, p. 168). Prucha analyzed the impact of the bill upon tribal sovereignty:

Restricted though it was, this legislation was revolutionary. For the first time the United States asserted its jurisdiction over strictly internal crimes of Indians against Indians, a major blow at the integrity of the Indian tribes and a fundamental readjustment in relations between the Indians and the United States government. (Prucha, 1984, 1986, pp. 229-230)

Cohen’s analysis was more tempered:

The force of the decision in *Ex parte Crow Dog* [sic] was not weakened, although the scope of the decision was limited, by subsequent legislation which withdrew from the rule of tribal sovereignty a list of 7 major crimes, only recently extended to 10. Over these specified crimes jurisdiction has been vested in the federal courts. (Cohen, 1942/1971, p. 125)

The ten crimes “for which federal jurisdiction has displaced tribal jurisdiction” include the original seven crimes plus three additional crimes added by legislative acts in 1909 and 1932 (Cohen, 1942/1971, p. 147). The three added crimes include “notorious cases of robbery, incest, and assault with a dangerous weapon” (Cohen, 1942/1972, p. 147).

What were the seven major crimes over which the United States asserted jurisdiction?

According to § 9, Act of March 3, 1885:

That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefore to the laws of such Territory relating to said crimes, and shall be tried therefore in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases... (23 Stat. 362, 385)

As one tribal member analyzed the congressional actions whereby the United States assumed jurisdiction over ten major crimes:

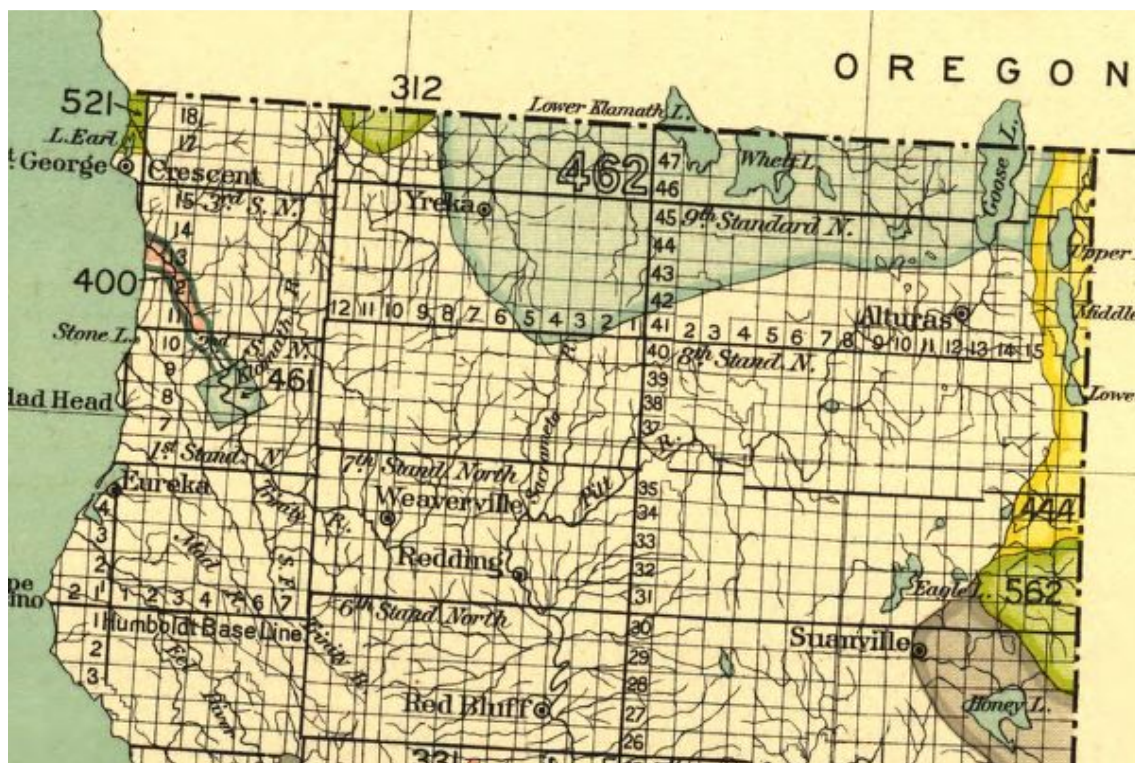
By thus assuming power over certain aspects of tribal life, the United States government broke the ancient customs of the Sioux tribe and imposed a foreign standard of justice. Breakdown of tribal customs was fairly rapid after that, leading to the present situation where federal law is considered an outside force of the white man and not a means of establishing tribal law and order. (Deloria, 1971, p. 154)

***Citizenship/tribal sovereignty – U.S. v. Kagama, 118 U.S. 375 (1886).***

Shortly after the Major Crimes Act was appended as § 9 to the Appropriations Act of March 3, 1885, its constitutionality was challenged by a case emanating from the “Circuit Court

of the United States for [the] District of California” (118 U.S. 375). “Kagama, alias Pactah Billy, an Indian” was indicted for the murder of “Iyouse, alias Ike, another Indian,” the murder having taken place “at Humboldt County, in the State of California, within the limits of the Hoopa Valley Reservation” (118 U.S. 375, 376). Another individual, “Mahawaha, alias Ben, also an Indian,” was charged with “aiding and abetting in the murder” (118 U.S. 375, 376). While referenced as *U.S. v. Kagama*, the official title is *United States v. Kagama & Another, Indians* (118 U.S. 375).

*Figure R9*  
*Hoopa Valley Reservation*  
*As Per Congressional Act, Hupa Treaty of 1864,*  
*Approval of the Commissioner of Indian Affairs, & Executive Order*



The tribal land upon which the murder took place had only recently been finally approved as the Hoopa Valley Reserve through a series of official interactions between the U.S. and the



Hupa. Pursuant to an act of Congress enacted April 8, 1864, a treaty had been negotiated on August 21, 1864, with the “Hupa (S. Fork, Redwood, and Grouse Creek bands)” to reserve “the whole of Hoopa valley [sic]” for the Hupa Reserve (Royce, p. 832). The treaty had been subsequently approved by the “Commissioner of Indian Affairs” on October 3, 1864 (Royce, p. 833). However, not until June 23, 1876, had an “Executive order” been issued declaring the boundaries established by the act of Congress and subsequent Hupa Treaty of 1864 “to be the true boundaries of the Hoopa Valley Reserve” (Royce, p. 833). Thus, at the time the incidents of the case occurred, the location in northwestern California had been officially approved by the U.S. government as Indian country for less than ten years (See preceding Figure R9, #461 for the Indian country under discussion) (See Royce, pp. 832-833 for map number).<sup>159</sup> However, according to tribal history, “The Hupa people have occupied their lands [in the Hoopa Valley] since time immemorial” (Hupa History – Hoopa Valley Tribe, ¶ 5).

In its ruling upholding the constitutionality of the Major Crimes Act, the Court described the dependency of tribal members upon the United States and discussed relations between tribal members and the states, the latter point which they summarized as follows: “They [the tribal members] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies” (118 U.S. 375, 384). Regarding tribal sovereignty (and by implication, citizenship), the Court ruled:

They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided. (118 U.S. 375, 381-382)

After citing and discussing the Marshall Court rulings in both *Cherokee Nation v. Georgia* and *Worcester v. Georgia* regarding tribal sovereignty and the position of tribal governments relative to both the states and the national government, the Court noted the federal government's change in direction regarding its dealings with the tribes: "But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure – govern them by acts of Congress (118 U.S. 375, 382). The Court determined that the "ninth section of the Indian Appropriation Act of March 3, 1885" was "valid and constitutional" in that it was "within the competency of Congress" and therefore "the Circuit Court of the United States for the District of California ha[d] jurisdiction of the offence [sic] charged in the indictment in this case (118 U.S. 375, 383, 385).

Prucha described the importance of *U.S. v. Kagama* in terms with which Deloria would have agreed:

When the Supreme Court in *United States v. Kagama* on May 10, 1886, upheld the right of Congress to take this step [asserting federal jurisdiction over strictly internal crimes of Indians], the way was open for unlimited interference by the federal government in the affairs of the Indians. (Prucha, 1984, 1986, p.230)

Cohen viewed congressional jurisdiction over ten major crimes in Indian country as expressed in the acts of Congress and upheld by the Court from a different perspective. Instead of focusing upon what conceivably might happen at some unknown point in the future, Cohen used a viewpoint that focused on what was not limited. According to Cohen, "An Indian tribe may exercise a complete jurisdiction over its members and within the limits of the reservation, subordinate only to the expressed limitations of federal law" (Cohen, 1942/1971). He continued:

What is even more important ... is the persistent silence of Congress on the general problem of Indian criminal jurisdiction. There is nothing to justify an alternative to the conclusion that the Indian tribes retain sovereignty and jurisdictions over a vast area of ordinary offenses over which the Federal

Government has never presumed to legislate and over which the state governments have not the authority to legislate. (Cohen, 1942/1971, p. 148)

***Citizenship/tribal sovereignty – Talton v. Mayes, 163 U.S. 376 (1896).***

In 1896 the Cherokee Nation again had a case before the Supreme Court, *Talton v. Mayes* (1896). Talton, a tribal member, had been convicted of murder on New Year's Eve, 1892, by a "special Supreme Court of the Cherokee nation, Cooweeskoowee District" (163 U.S. 376, 337). The victim was a Cherokee, and the crime had occurred on tribal lands. Talton was sentenced to death by hanging. In February of 1893, Talton filed a writ of *habeas corpus* against Mayes, the high sheriff of the Cherokee Nation. In the writ, Talton contended he had been denied due process of law because the Cherokee grand jury violated his Fifth Amendment rights guaranteed by the United States Constitution. The District Court of the United States for the Western District of Arkansas in which the writ of *habeas corpus* had been filed discharged the writ 163 U.S. 376, 378). Talton appealed, and the U.S. Supreme Court agreed to hear the case.

After reviewing the facts of the case, the Court observed that tribal sovereignty was guaranteed both by treaties and by congressional legislation. The Court spoke of the Cherokee Nation in terms used to describe a protectorate state when considering international law.

By treaties and statutes of the United States the right of the Cherokee nation to exist as an autonomous body, subject always to the paramount authority of the United States, has been recognized. And from this fact there has consequently been conceded to exist in that nation power to make laws defining offenses and providing for the trial and punishment of those who violate them when the offenses are committed by one member of the tribe against another one of its members within the territory of the nation. (163 U.S. 376, 379-380)

Following a review of pertinent treaties and federal legislation, the Court noted the major legal issue of the case – "[D]oes the Fifth Amendment of the Constitution apply to the local legislation of the Cherokee nation" (163 U.S. 376, 382)? Were the powers of tribal government derived

from the Constitution and thus controlled by the Fifth Amendment? Or, were tribal powers derived from tribal existence prior to the formation of the United States, subject only to the general provisions of the Constitution governing treaties and the regulation of the Indian trade as well as related congressional legislation?

Before attempting to answer the legal questions posed by itself, the Court reviewed previous decisions, noting the evidence provided by judicial precedence regarding the legal issues under current consideration. Previous decisions included, as might be expected, *Cherokee Nation v. Georgia*, *Worcester v. Georgia*, and *Kagama v. United States* (163 U.S. 376, 383-384). The Court then presented its own ruling. In upholding the district court's dismissal of Talton's writ against Mayes, the high sheriff of the Cherokee Nation, the Court declared:

It follows that as the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which as we have said, had for its sole object to control the powers conferred by the Constitution of the National Government. (163 U.S. 376, 384)

The Court further noted that the legal issues raised were "solely" for the courts of the Cherokee Nation to determine.

The question whether a statute of the Cherokee nation which was not repugnant to the Constitution of the United States or in conflict with any treaty or law of the nation, and the determination of what was the existing law of the Cherokee nation as to the constitution of the grand jury, were solely matters within the jurisdiction of the courts of that nation... (163 U.S. 376, 385)

In the aftermath of *Ex Parte Crow Dog*, the Major Crimes Act and of *U.S. v. Kagama*, one is tempted to ask, "Why such a different judicial outcome from that of *Kagama*?" Deloria may well have hit upon the critical difference. In discussing *Ex Parte Crow Dog*, Deloria had earlier noted:

But the Sioux did not have formal courts as did the Five Civilized Tribes of Oklahoma. Thus while the judgments of the Cherokee, Chickasaw, Creek, Choctaw and Seminole courts were upheld in capital offenses, there was no precedent in Sioux country for the situation of one tribal member killing another. (Deloria, 1971, p. 153).

Introducing the case, *Talton v. Mayes*, Deloria compared the Sioux and Cherokee in both perceptual and operational terms:

It is unfortunate for the Sioux Nation that it never achieved the status of the Cherokee – civilized. Nearly a decade after the case of *Crow Dog* – at a time when the other tribes had been placed under the Seven Major Crimes Act – the so-called Five Civilized Tribes still had well-operated and valid court systems of their own. The courts of the Five Civilized Tribes were probably the best operated on this continent. It was, therefore, a case of two systems of law running concurrently on parallel tracks rather than any interference from one to the other. (Deloria, 1971, p. 169)

Deloria concluded:

In spite of various treaty violations, the Five Civilized Tribes had been able to maintain their governments with a great deal of integrity from the time they arrived in Oklahoma until the early years of the twentieth century. There was, therefore, no intrusion by the federal government into the workings of the Cherokee Republic. *Talton v. Mayes* was rather an attempt to weld the two systems, Cherokee and American, into one consistent pattern of jurisprudence. (Deloria, 1971, p. 169)

In Deloria's view, *Talton v. Mayes* has great significance for modern-day tribal governments.

According to Deloria:

In a great decision, which still has relevance to every Indian tribe that operates its own tribal courts, the Supreme Court found that the Bill of Rights did not apply to the relationship between the Cherokee Nation and its citizens *because the Cherokee Nation had enjoyed self-government before the Constitution had been adopted! AS DID EVERY OTHER TRIBE!!* (Emphasis in original) (Deloria, 1971, pp. 169-170)

### **Citizenship via congressional legislation.**

The preceding material presented several judicial cases related to tribal sovereignty and citizenship as well as a congressional response to a Court ruling focused on tribal sovereignty

that indirectly bore on citizenship. We move now to a continuation of examining the major methods whereby American Indians acquired citizenship as identified by Cohen (See previous Table R1). All of the methods remaining for discussion whereby the indigenous peoples in the United States acquired American citizenship occurred as a result of various legislative actions passed by Congress in the late nineteenth and early twentieth centuries. These congressional acts include:

- Dawes Allotment Act (1887).
- Act of November 6, 1918, pertaining to tribal veterans of World War I.
- Indian Citizenship Act (1924).

***The dawes allotment act, 24 stat. 388 (1887).***

First, it should be noted, citizenship was not the major purpose of the Dawes Act.

Instead, civilization was the goal.

[T]he Dawes Allotment Act of 1887 was the first comprehensive proposal to replace tribal consciousness with an understanding of the value of private property. The idea was not only to discourage native habits but to encourage Indians to accept the social and economic standards of white society. (McDonnell, p. 1)

Ironically, it was the so-called friends of the American Indian who pushed the Dawes Allotment Act forward into law. One historian described Henry L. Dawes, U.S. Senator from Massachusetts, as “one of the most active of the well-meaning opponents of Indian nationality” (Debo, p. 300). Another historian noted that Dawes “became one of the most active supporters of the individualization of the Indian through private property” (Prucha, 1984, 1986, p. 226). Tribal identity and tribal culture were perceived as standing in the way of any effort to civilize the huge mass of tribal members.

It [the Dawes Allotment Act] was an act pushed through Congress, not by western interests greedy for Indian lands, but by eastern humanitarians who

deeply believed that communal landholding was an obstacle to the civilization they wanted the Indians to acquire and who were convinced that they had the history of human experience on their side. (Prucha, 1984, 1986, p. 227)

Besides standing in the way of civilization, tribal culture was perceived in negative fashion by most nonIndians. An nonIndian agent for the Yankton Sioux in southeastern South Dakota provided the following view of tribal culture in his report to the Indian Bureau in 1877:

As long as Indians live in villages they will retain many of their old and injurious habits. Frequent feasts, heathen ceremonies and dances, constant visiting – these will continue ... I trust that before another year is ended they will generally be located upon individual land or farms. From that date will begin their real and permanent progress. (Debo, p. 299)

That civilizing the various tribal members was the dominant purpose of the Dawes Act can also be seen in negative relief, i.e., from the criticism of those who opposed the Allotment Act.

According to Senator Teller, one of the most vocal opponents of the Dawes Act:

[T]he friends of severalty had the whole matter turned around, mistaking the end for the means. Once the Indians were civilized and Christianized and knew the value of property and the value of a home, then give them an allotment of their own... But do not expect the allotment to civilize and Christianize and transform the Indians. (Prucha, 1984, 1986, p. 225)

Citizenship would follow once the allotments had been made and received by individual tribal members (Debo, pp. 300-301; Prucha, 1984, 1986, p. 226). In actuality, it wasn't this simple as the Dawes Act's "final provisions on citizenship ... were a compromise" of two opposing positions within the Indian reform movement (Prucha, 1984, 1986, p. 232). One reform position asserted that citizenship constituted the "means whereby the Indian would advance on the road to civilization" and therefore should "be made citizens in a mass" (Prucha, 1984, 1986, p. 231). This position was reflected by the Board of Indian Commissioners' statement issued in 1884:

The solution of the Indian problem is citizenship, and we believe that the time has come to declare by an act of Congress that every Indian born within the territorial limits of the United States is a citizen of the United States and subject to the jurisdiction thereof. (Prucha, 1984, 1986, p. 231)

The opposing reform position held that citizenship for Indians was “a reward to be conferred when an Indian had demonstrated his desire and his competence to live among the whites” (Prucha, 1984, 1986, p. 231). Senator Dawes was the foremost advocate of this position, and he “persisted in his opinion that indiscriminate granting of citizenship to all Indians would be bad and held to the position that citizenship should be tied to taking land in severalty” (Prucha, 1984, 1986, pp. 231-232). The compromise position contained in the Dawes Act, which contained portions of both views, consisted of the following:

Every Indian to whom an allotment was made and every Indian who separated himself from his tribe and adopted the ways of civilized life was declared to be a citizen of the United States, without, however, impairing the Indian’s right to tribal or other property. (Prucha, 1984, 1986, p. 232)

Neither party was completely satisfied; however, John Elk’s actions that had precipitated *Elk v. Wilkins* and which had been ruled to be without protection of the law were now legal and had been codified into law. Moreover, the position of the Board of Indian Commissioners would not be fully realized until the passage of the Indian Citizenship Act in 1924. In addition, those advocating “immediate citizenship for all Indians were disappointed because *tribal Indians on reservations were still excluded*” (Emphasis added) (Prucha, 1984, 1986, p. 232). Finally, the Dawes Act’s provisions regarding citizenship were subsequently modified in 1906 by the Burke Act, “thus reversing, or at least slowing down, the individualizing, Americanizing process of the Dawes Act” (Prucha, 1984, 1986, p. 267). The Burke Act accomplished this by postponing “citizenship for the Indians until the end of the trust period” (Prucha, 1984, 1986, p. 267). The Burke Act also permitted the “removal of the trust restrictions from the allotments of Indians



adjudged competent” (Debo, p. 301). The Burke Act was passed despite the strong opposition of the “old reformers [who] were no longer able to control the legislative formulation of Indian policy” (Prucha, 1984, 1986, p. 267).<sup>160</sup>

As was noted previously, citizenship proceeded in a somewhat haphazard, piecemeal fashion. This occurred partially because the idea of citizenship for American Indians grew out of the allotment movement designed to break up the tribal mass, partially because most Indian tribes were regarded by nonIndians as uncivilized (and, consequently, in need of tutelage before the benefits of citizenship could be granted), and partially because of the confusing notion (to nonIndians) that tribes were sovereign nations and as such, tribal members could not possibly be citizens of the U.S. The beginnings of allotment developed with Jackson’s removal of the Five Civilized Tribes (the Cherokee, Chickasaw, Choctaw, Creek, and Seminole) from their lands east of the Mississippi to lands west of the Mississippi called the Indian Territory (Debo, pp. 121-130; Deloria, 1971, p. 128; Prucha, 1984, 1986, pp. 80-93; Wilson, pp. 163-172). As has also been shown, allotment appeared in treaties and in limited acts of Congress regarding specific tribes. Now, however, with the Dawes Act, allotment became enshrined as the dominant force in the federal government’s American Indian policy.

Besides providing citizenship for some, but not all, Indians, what exactly did the Dawes Act provide? Basically, the Dawes Act authorized the President “to survey the reservations or selected parts of them and to allot the land to individual Indians” (Prucha, 1984, 1986, p. 226). The standard size of each allotment “reflected the strong tradition of a quarter-section [160 acres] homestead for the yeoman farmer” (Prucha, 1984, 1986, p. 226). Standard allotment shares were to go “to each head of a family, smaller amounts to unmarried men and children” (Debo, p. 300). Interestingly, the idea of a “head of a family” aroused opposition among the various tribes and

the Allotment Act had to be modified because women had been excluded from the allotment process. Debo explained:

But the Indians expressed so much opposition to this alien “head of a family” concept – in their society married women and children had property rights – that in 1891 the act was amended to provide equal shares to all – 80 acres of agricultural, 160 acres of grazing land. These amounts were subsequently modified in agreements made with different tribes. (Debo, p. 300)

Ella Deloria, a Santee Dakota woman, explained the status of women and women in her society:

“The simple fact is that woman had her own place and man his; they were not the same and neither inferior or superior” (Deloria, p. 39). Robert Utley, a former historian for the National

Park Service explained further:

Far from a mere drudge, the Lakota mother in fact dominated tipi affairs. She, not the husband, owned the lodge and all the family belongings. She exerted the paramount authority over the children – daughters until wed and sons until their voices began to change. (Utley, p. 7).

The matrilineal pattern of Lakota life was explained by Mari Sandoz, who had easy access to the Lakota camped near her childhood home in the Sand Hills country along the Niobrara River where her father operated a trading post. According to Sandoz:

Early accounts of Indian life on the Plains were usually by those with no understanding of the matrilinear pattern, in which the woman’s family accepted the new husband as son in place of the boy who would go to his wife’s people when he married, or for the son they never had. (Sandoz, p. 78)

Sandoz also explained that the power of divorce resided in the Lakota woman’s hands:

Divorce was particularly easy for the woman. The tipi, the lodge, was hers and any time she was dissatisfied with the husband she was free to throw his possessions out into the village circle as public notice that she was done with him. (Sandoz, p. 81)

Actual title to allotments followed these procedures:

When the secretary of the interior [sic] approved the allotments, he would issue to each Indian a patent, which declared that the United States would hold the allotted lands in trust for twenty-five years for the Indian and for his sole benefit or that of his heirs. At the expiration of the trust period, the Indian would receive the land in fee simple. Any conveyance or contract touching the land during the trust period was null and void, and the president [sic] at his discretion could extend the period. Once an Indian had received his allotment, he would become a citizen of the United States. (Prucha, 1984, 1986, p. 226)

Debo viewed the Dawes Allotment Act as a piece of congressional work that resulted from the union of “humanitarians and land-grabbers” (Debo, p. 300). She explained:

Along with the “benefit” [of civilization] to the Indians was a tempting bonus: after the allotments were made, much land would be left over for white settlement. The philanthropists even reasoned that smaller holdings would advance the Indians’ “civilization”; too much land encouraged their roaming tendencies. (Debo, pp. 299-300)

Debo wove together the arguments of the “humanitarians” and the “land-grabbers” with the voices of the tribal leaders:

The Indians’ friends also argued that only a fee simple title would protect their land from the insecurity of reservation and treaty guarantees. These arguments did not deceive the land-grabbers. They *knew*. The only protection the Indian had came from his tribe; standing alone before the “equality” of the white man’s law and courts he was helpless. The Indians who had experienced allotment knew this, too. With the earnestness of desperation the leaders of the Five civilized Tribes told what had happened in Mississippi, Alabama, Kansas, and elsewhere. Very people listened. (Debo, p. 299)

Some of the people who did listen, however, were members of the Senate committee that he chaired, the Committee on Indian Affairs. Their voices, however, constituted a minority viewpoint. Two twentieth-century tribal members (a Kiowa attorney and a Cheyenne River Sioux journalist)<sup>161</sup> examining the Dawes Act and its aftermath combined humor with the historical record’s pathos of Cassandra-like warnings regarding the consequences to follow should the Dawes Act be enacted.

It must have been Dawes's primitive belief in magic that led him to advocate allotment of the Plains Indians' landholdings. *A minority of his committee recommended against the plan*, declaring that those tribes that maintained their lands in tribal tracts were notably lacking in poverty, whereas those tribes already allotted under the preceding treaties of the 1850's were poverty-stricken and demoralized. (Emphasis added) (Kickingbird & Ducheneaux, p. 19)

While tribal voices couldn't derail the engine that was allotment, they did succeed in getting some tribes excluded from the Dawes Act, which "became law on February 8, 1887" (Prucha, 1984, 1986, p. 226). These tribes included "the Five Civilized Tribes, the Osages, Miamis, Peorias, the Sacs and foxes in the Indian Territory, the Seneca Indians in New York, and the strip of Sioux lands in Nebraska" (Prucha, 1984, 1986, p. 226). However, this didn't last long. A little over a year later (April, 1888), the Creeks and Seminoles were forced to "choose between ceding their unassigned land and losing it" (Debo, p. 304). Neither the Choctaws and Chickasaws nor the other Oklahoma tribes fared well in the aftermath of the American executive branch's actions following congressional passage of the Dawes Allotment Act.

A number of commissions were sent to Oklahoma to negotiate land cessions. The Atoka Agreement stripped the Choctaws and Chickasaws of their lands ... and various other agreements spelled out the systematic reduction of Oklahoma Indian tribes to a conglomerate of legally incompetent individuals with small land allotments under minimum legal protections. (Kickingbird and Ducheneaux, p. 22)

Section 5 of the Dawes Allotment Act contained the provision operating to the advantage of the dominant nonIndian society and to the disadvantage of the various tribes. Section 5 dealt with the issue of "surplus lands remain[ing] after the allotments [had] been made" (Cohen, 1942/1971, p. 78). Officially, the procedures for the tribal lands following allotment were that "[n]egotiations were to be carried on with the tribes for the sale to the United States of the land remaining after the allotments were made and for its [subsequent] opening to white settlement" (Debo, p. 300). The reduction of Indian land holdings was dramatic as millions of acres of lands

were lost to the tribes and sold to nonIndians by the federal government. For the two-year period between 1889 and 1891, “the commissioner of Indian affairs [sic] could report that ... he had restored to the public domain 12,071,380 acres, or 11 ½ per cent, of the total reservation area of 104,314,349 acres existing in 1889” (Debo, p. 305). Allotment did not officially end until the passage of the Indian Reorganization Act (IRA) in 1934 as a part of FDR’s New Deal program. When passed in 1934, the IRA “prohibited further allotment of tribal lands for those tribes that accepted its provisions [the IRA’s] and organized constitutions under it” (Kickingbird & Ducheneaux, p. 30). What occurred during the years between the passage of the Dawes Allotment Act and the enactment of FDR’s Indian Reorganization Act was described by Kickingbird and Ducheneaux:

When the allotment period ended in 1934, a total of 246,569 allotments had been made. They comprised 40,848,172 acres of land on some 100 different reservations. The actual land loss to the various tribes was much greater, however, than the mere loss of individual allotments. (Kickingbird & Ducheneaux, p. 23)

The two former Bureau of Indian Affairs employees explained how additional tribal lands were lost.

When [tribal lands were] divided into individual allotments, the lands in excess of the actual amount needed to satisfy immediate tribal members’ requirements was declared “surplus” to the tribes’ needs and sold by the United States for a pittance. The proceeds were placed in the federal treasury, where churches went immediately to get the funds for mission schools. In total some 90 million acres were taken from Indians as easily as checking out a book in the library. (Kickingbird & Ducheneaux, pp. 23-24)

Listed in Table R2 are figures showing total Indian land holdings in the United States for various years, beginning with figures before allotment became the dominant federal policy towards the Indian tribes and ending with the passage in 1934 of the Indian Reorganization Act.

*Table R2*  
*Total American Indian*  
*Land Holdings in the Continental United States*

<u>Year</u>	<u>Indian Land Holdings (in acres)</u>
1881	155,632,312 <sup>162</sup>
1890	104,314,349 <sup>163</sup>
1900	77,865,373 <sup>164</sup>
1934	52,000,000 <sup>165</sup>

The effects of allotment were summarized by one historian:

By 1934, the grim picture of a shriveling land base and an economically deprived people was clearly drawn. Two-thirds of the Indians were completely landless or did not own enough land to make a subsistence living.... Many tribes were left with land assets that were not usable because of “checkerboarding”<sup>166</sup> and complicated land titles,<sup>167</sup> overgrazing and erosion, or lack of irrigation. (McDonnell, p. 121)

Another historian summarized the taking of tribal lands for allotment to individual tribal members, the sale of tribal land remaining after allotment to the federal government for re-sale to nonIndians, and the sale of Indian-owned allotments to nonIndians by noting that as of the late 1920s, “the bulk of the most valuable land and resources owned by Native Americans in 1880 was now in non-Indian hands” (Wilson, p. 332).

***Act of november 6, 1919 re: indian veterans of world war I, 41 stat. 350.***

Following World War I, the view of the tribes as a military threat had vanished and had been replaced by an image of Indian patriotism for the United States. Although “most of them, as non-citizens, were not eligible for the draft,” they volunteered in the “thousands to fight *for* the United States during the First World War” (Emphasis in original) (Wilson, p. 332). More than “ten thousand” Indians enlisted in “some branch of the army and navy” during World War I

(Prucha, 1984, 1986, p. 267). Although some advocated that they be placed in “separate Indian military units,” the Commissioner of Indian Affairs, Cato Sells, “refused to sanction” such an idea (Prucha, 1984, 1986, p. 267). According to Sells, Indians “should fight shoulder to shoulder with the white man in a common cause and go into the war ‘as the equal and comrade of every man who assails autocracy and ancient might’” (Prucha, 1984, 1986, p. 267). The Iroquois Confederacy, having maintained a strong sense of tribal identity, “declared war on Germany in 1917” (Debo, p. 417). The various tribal members who enlisted in the country’s armed forces “so distinguished themselves” during their service to the nation in World War I that citizenship “seemed a fair recognition” (Debo, p. 335). On November 6, 1919, Congress enacted legislation which “provided that any Indian who received an honorable discharge from military service during World War I could, if he desired it, apply for citizenship and be granted it by a competent court without affecting rights to tribal property” (Prucha, 1984, 1986, p. 267).<sup>168</sup>

It was previously noted that “tribal Indians on reservations were still excluded” from citizenship when the Dawes Allotment Act was passed (Prucha, 1984, 1986, p. 232). One of the last groups of Indians to surrender to the United States was the Hunkpapa Lakota who had gone north into Canada with Sitting Bull. Following their surrender, they rejoined their fellow tribal members on Standing Rock, settling as far from the agency at Fort Yates, North Dakota, as was possible and still remain on the Standing Rock Sioux Indian Reservation, in a community situated on Rock Creek where it entered the Grand River, not far from where Sitting Bull had been born and where he was subsequently killed in December of 1891.<sup>169</sup> Sitting Bull and his followers actively resisted allotment (Debo, p. 302; Utley, p. 269). However, the descendants of these Hunkpapa Lakota enlisted in large numbers during World War I. Following their service

and return to Standing Rock, a Doughboy monument was erected in the community (See Figure R10).<sup>170</sup>

*Figure R10*  
*Doughboy Statue Erected By the Hunkpapa Band of the Lakota Nation*



The inscription on the monument reads: “DEDICATED TO THE MEMORY OF THOSE WHO MADE THE SUPREME SACRIFICE AND IN HONOR OF THOSE WHO SERVED IN THE WORLD WAR 1917-18 – PRESENTED BY THE HUNKPAPA BAND OF SIOUX NATION.”<sup>171</sup> It should be noted, however, that the monument was not erected until the federal government’s policy of allotment and destruction of the tribal mass had been officially ended by the passage of the Indian Reorganization Act under President Franklin Delano Roosevelt.



Today, only three monuments stand on Standing Rock – a monument commemorating the Lakota legend of Standing Rock for which the reservation was named, the Sitting Bull monument, and the Doughboy monument in Rock Creek commemorating the veterans of World War I who fought in the service of a country they had previously defeated in war and in battle, a country which was committed to the destruction of tribal existence, and a country with which they were currently allied as provided for by their treaties with the United States. Lakota regard for the veterans who served in World War I can also be verified by an examination of three current albums of traditional Lakota music.<sup>172</sup>

***Indian citizenship act of 1924, 43 stat. 253.***

Prucha credited “the patriotic fervor that persisted after the war” as being instrumental in pushing “for a measure to complete the circle” of citizenship for all Indians (Prucha, 1984, 1986, p. 273). According to Prucha, about two-thirds of all Indians had been accorded citizenship by the early 1920s (Prucha, 1984, 1986, p. 273). That would, of course, exempt “the still-proud remnants of the Iroquois Confederacy in New York” who denied U.S. citizenship, preferring instead their citizenship as a tribal member in the Iroquois confederation (Debo, p. 335-336).<sup>173</sup> In fact, a writer could still report in 1971 that “the Iroquois steadfastly refuse to accept American citizenship” (Deloria, 1971, p. 130). Following the passage of the Indian Citizenship Act, the Iroquois cited the ruling in *Elk v. Wilkins* by which a positive act of the United States had been required before a tribal member could become a U.S. citizen. Given the Supreme Court’s ruling which had denied any unilateral action on the part of a tribal member (John Elk), the Iroquois questioned “whether the United States could extend citizenship on a unilateral basis” (Deloria, 1974, p. 148). The Standing Rock Sioux attorney and co-founder of the Institute for Indian Law explained:

If it [the United States] previously had required Elk to wait for a positive act on the part of the United States before he could become a citizen, would it not require a positive act on the part of the Indians in 1924 to become United States citizens?

The Iroquois served notice on the United States that they did not want American citizenship. (Deloria, 1974, p. 148)

Notwithstanding the position of the Iroquois regarding American citizenship, Congress enacted what is currently referenced as the Indian Citizenship Act of 1924. The act declared “all non-citizen Indians born within the territorial limits of the United States ... to be citizens of the United States” (43 Stat. 253). It further provided that “the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property” (43 Stat. 253). The reasons for enacting such legislation were stated in a report of February 22, 1924, to Congress by the Committee on Indian Affairs. According to the House of Representative’s Committee on Indian Affairs:

At the present time it is very difficult for an Indian to obtain citizenship without either being allotted and getting a patent in fee simple, or leaving the reservation and taking up his residence apart from any tribe of Indians. This legislation [the Indian Citizenship Act] will bridge the present gap and provide means whereby an Indian may be given citizenship without reference to the question of land tenure or the place of his residence. (Cohen, 1942/1971, p. 82, n. 239)

Despite such sentiments, however, the act did not grant citizenship to all Indians. Excluded from the act were Indians living in the United States who had been born in “Canada, Mexico, or other foreign lands, since the 1924 Act referred only to ‘Indians born within the territorial limits of the United States’” (Cohen, 1942/1971, p. 154). This was not remedied until Congress inserted the following into § 303 of the Nationality Act of October 14, 1940, that declared: “The right to become a naturalized citizen under the provisions of this Act shall extend only to white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere” (Cohen, 1942, 1971, p. 154, n. 27).

Confusion arose over the title of the act, which, according to Cohen, arose from “a clerical error” (Cohen, 1942/1971, p. 82). When the act arose in the House of Representatives, it was entitled “An Act To authorize the Secretary of the Interior to issue certificates of citizenship to Indians” (43 Stat. 253). The House “originally ... contemplated a procedure whereby the Secretary of the Interior was to issue such certificates” (Cohen, 1942/1971, p. 82). According to Cohen, “The Senate amended the bill so as to eliminate all departmental discretion in its application” (Cohen, 1942/1971, p. 82, n. 239). When finally passed, the legislation “acted of its own force to confer citizenship upon the Indian” (Cohen, 1942/1971, p. 82). The title, when passed by both houses of Congress, read “A bill granting citizenship to Indians, and for other purposes” as can be seen by examining the Congressional Records for the 68th Congress (Cohen, 1942/1971, p. 82 & p. 82, n. 239). The original title was not amended by the clerk to reflect the Senate changes that had been agreed to by the House when the amended bill was reported in the U.S. Statutes At-Large.

So, through a lengthy, tortuous, changing process, American Indians received United States citizenship. Ironically (from the perspective of earlier officials) and jubilantly (from the tribal perspective), the citizenship received in 1924 was different from that contemplated by the Dawes Act in 1877.

So the complete transition from tribal status to individualized citizenship that the Dawes Act reformers had had in mind when they talked about citizenship did not occur. The Indians were both citizens of the United States and persons with tribal relations. (Prucha, 1984, 1986, p. 273)

## Appendix R1

### Women's Suffrage: By Country & By State of the Union

#### Dates When Nations Accorded Full Suffrage for Women<sup>174</sup>

1893	New Zealand	1939	El Salvador	1950	Haiti
1906	Finland	1941	Indonesia	1952	Bolivia
1913	Norway	1942	Dominican Republic		Greece
1915	Denmark	1944	France	1953	Lebanon
1917	Estonia		Jamaica		Mexico
	Latvia	1945	Bulgaria	1955	Ethiopia
	Lithuania		Guatemala		Honduras
	Soviet Union		Italy		Malaysia
1918	Austria		Japan		Nicaragua
	Czechoslovakia		Panama		Peru
	Germany		Trinidad & Tobago	1957	Columbia
	Luxembourg	1946	Albania	1958	Iraq
	Poland		Ecuador		Paraguay
1919	Netherlands		Malta	1959	Nepal
	Sweden		Romania	1960	Canada
1920	Iceland		Yugoslavia	1963	Iran
	United States	1947	Argentina		Kenya
1922	Ireland		Pakistan	1964	Afghanistan
1924	Mongolia		Venezuela		Libya
1928	United Kingdom	1948	Belgium	1971	Switzerland
1930	Turkey		Burma	1972	Syria
1931	Ceylon/Sri Lanka		Israel	1975	Portugal
1932	Brazil		South Korea	1994	South Africa
	Thailand	1949	Chile		
	Uruguay		China		
1934	Cuba		Costa Rica		
1937	Philippines		India		

#### U.S. States & Territories Granting Voting Rights to Women Prior to Passage of the Nineteenth Amendment: FULL SUFFRAGE<sup>175</sup>

1869	Wyoming	1912	Arizona	1917	New York
1893	Colorado		Kansas		Rhode Island
1896	Idaho		Oregon	1918	Michigan
	Utah	1913	Alaska		Oklahoma
1910	Washington	1914	Montana		South Dakota
1911	California		Nevada		

**U.S. States Granting Voting Rights to Women Prior to the Passage of the  
Nineteenth Amendment:**

**PRESIDENTIAL SUFFRAGE ONLY<sup>176</sup>**

1913	Illinois
1917	Nebraska
	North Dakota
1919	Indiana
	Iowa
	Maine
	Minnesota
	Missouri
	Ohio
	Tennessee
	Wisconsin

**U.S. States Granting Voting Rights to Women Prior to the Passage of the  
Nineteenth Amendment:**

**PRIMARY SUFFRAGE ONLY<sup>177</sup>**

1917	Arkansas
1918	Texas

**U.S. States DENYING Voting Rights to Women Prior to the Passage of the  
Nineteenth Amendment:**

**(Listed by Geographic Region)<sup>178</sup>**

<u>New England</u>	<u>Middle Atlantic</u>	<u>South</u>	<u>West</u>
Connecticut	Delaware	Alabama	New Mexico
Massachusetts	Maryland	Florida	
New Hampshire	New Jersey	Georgia	
Vermont	Pennsylvania	Kentucky	
	West Virginia	Louisiana	
	Mississippi		
	North Carolina		
	South Carolina		
	Virginia		

## **Appendix S**

### **The Fourteenth Amendment**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of Electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in each State.

Section 3. No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## Appendix T

### Rejection and Ratification of the Fourteenth Amendment: A Geopolitical Framework

Key		
Date of Admission	STATE	<u>ra</u> : (ratification & date) rej: (rejection & date)

Northern States	Border States	Southern States
<b>NH</b> <u>ra</u> : 07-06-1866	<b>DE</b> rej: 02-07-1867	<b>VA</b> rej: 01-09-1867
<b>VT</b> <u>ra</u> : 10-26-1866	<b>MD</b> rej: 03-22-1867	<b>NC</b> rej: 12-13-1866 <u>ra</u> : 07-02-1868
<b>MA</b> <u>ra</u> : 03-20-1867	1792 <b>KY</b> rej: 01-08-1867	<b>SC</b> rej: 12-20-1866 <u>ra</u> : 07-09-1868
<b>RI</b> <u>ra</u> : 02-07-1867	1821 <b>MO</b> <u>ra</u> : 01-08-1867	<b>GA</b> rej: 11-09-1866 <u>ra</u> : 07-21-1868
<b>CT</b> <u>ra</u> : 06-29-1866		1796 <b>TN</b> <u>ra</u> : 07-19-1866
<b>NY</b> <u>ra</u> : 01-22-1867		1812 <b>LA</b> rej: 02-06-1867 <u>ra</u> : 07-09-1868
<b>PA</b> <u>ra</u> : 02-06-1867		1817 <b>MS</b> rej: 01-30-1867
1803 <b>OH</b> <u>ra</u> : 01-04-1867		1819 <b>AL</b> rej: 12-??-1866 <u>ra</u> : 07-13-1868
1816 <b>IN</b> <u>ra</u> : 01-23-1867		1836 <b>AR</b> rej: 12-17-1866 <u>ra</u> : 04-06-1868
1818 <b>IL</b> <u>ra</u> : 01-15-1867		1845 <b>FL</b> rej: 12-03-1866 <u>ra</u> : 02-09-1868
1820 <b>ME</b> <u>ra</u> : 01-16-1867		1845 <b>TX</b> rej: 10-27-1866
1837 <b>MI</b> <u>ra</u> : 01-16-1867		
1846 <b>IA</b> <u>ra</u> : 03-09-1867		
1848 <b>WI</b> <u>ra</u> : 02-07-1867		
1850 <b>CA</b> No Action		
1858 <b>MN</b> <u>ra</u> : 01-16-1867		
1859 <b>OR</b> <u>ra</u> : 09-19-1866		
1861 <b>KS</b> <u>ra</u> : 01-12-1867		
1863 <b>WV</b> <u>ra</u> : No Date		
1864 <b>NV</b> <u>ra</u> : 01-22-1867		
1867 <b>NE</b> <u>ra</u> : 06-15-1867		

**Source:** James, J.J. (1984). *The ratification of the Fourteenth Amendment*. Atlanta, GA: Mercer University Press.



## Appendix U

### Attorneys Arguing For Segregated Public Schools In *Brown v. Board of Education*

#### The Defenders of Segregation

In defense of segregation, South Carolina gathered a team of lawyers that included the state's top legal officers, headed by one of the most respected constitutional lawyers in the country. Kansas sent a lone reluctant young assistant attorney general.

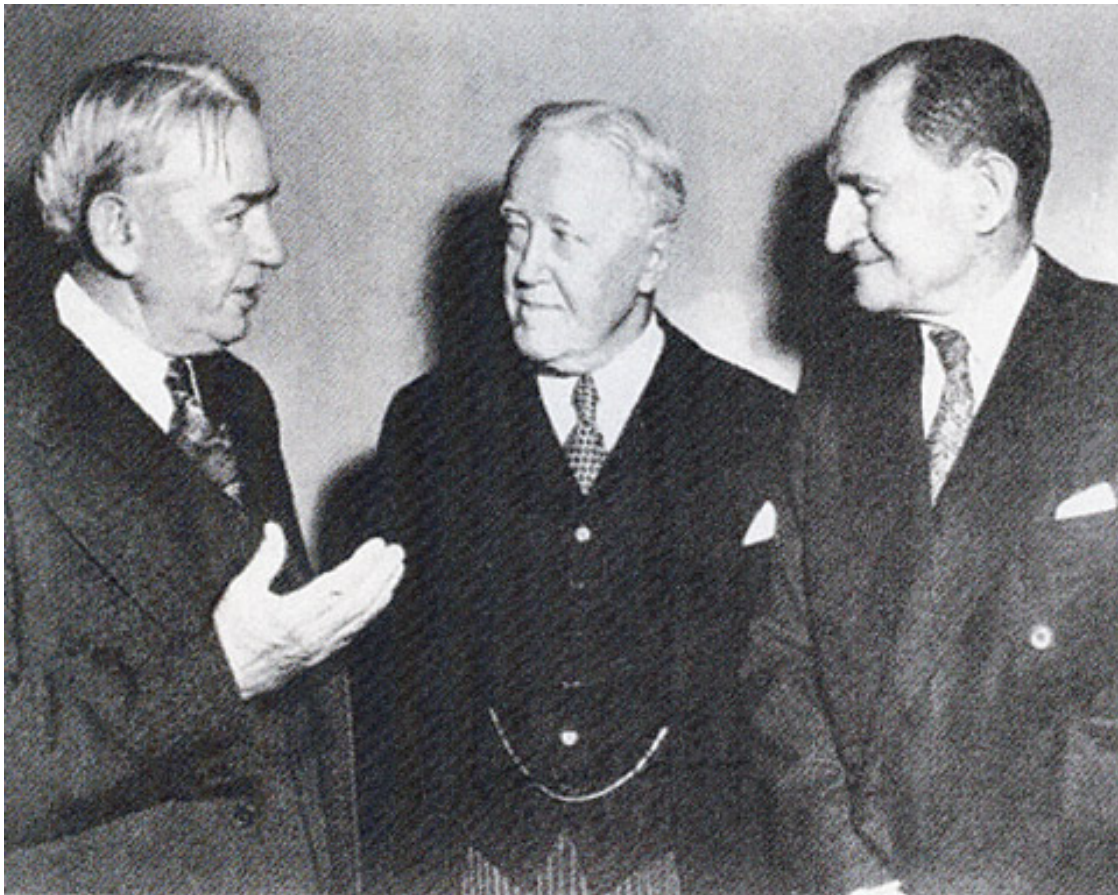
Citing *Plessy v. Ferguson*, the defenders claimed that the equal protection clause of the Constitution did not require integration and that the states had already begun a good faith effort to make their facilities equal. Inequality between the races persisted, they explained, because African Americans still needed time to overcome the effects of slavery.



**John Davis**

John W. Davis was the lead attorney for South Carolina. A graduate of the Washington and Lee University School of Law, Davis was one of the most distinguished constitutional lawyers in the nation. He had participated in more than 250 Supreme Court cases and appeared before the Court some 140 times. He had been a congressman from West Virginia, the U.S. Solicitor General, ambassador to Great Britain, and in 1924 the Democratic presidential candidate against Calvin Coolidge. In private practice in 1954, he took the case without accepting a fee. An intelligent and elegant advocate for segregation, he died a few months after the decision in *Brown v. Board of Education*.

(Courtesy of Library of Congress)



**James Lindsay Almond Jr.**

James Lindsay Almond Jr., as state attorney general, was the lead lawyer for Virginia. After receiving his law degree from the University of Virginia, he was a legislator and judge in the city of Roanoke. In his arguments before the Court, he claimed that “with the help and sympathy and the love and respect of the white people of the South, the colored man has risen...to a place of eminence and respect throughout the nation.” From 1958 to 1962 he served as governor of Virginia and remained a leading advocate of segregated schools.

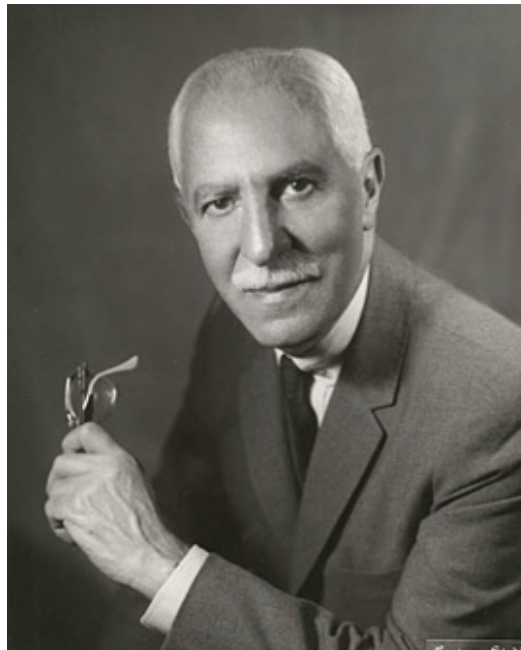
(Courtesy of the Family of T. Justin Moore)



**Paul E. Wilson**

Paul E. Wilson argued the case for Kansas. An assistant state attorney general, he was possibly the least enthusiastic of the defenders of segregation. Two of the public schools in Topeka had already desegregated, but it remained his job to defend the laws of his state until the Supreme Court ruled otherwise. A graduate of the Washburn University School of Law, he served two terms as district attorney of Osage County, Kansas. He was later a law professor and published his memoirs of the Brown case, entitled *A Time to Lose*, in 1995.

(Courtesy of University of Kansas Libraries, Kenneth Spencer Research Library)



**H. Albert Young**

H. Albert Young represented Delaware. A graduate of the University of Pennsylvania Law School, he had misgivings about defending legal segregation. As a trial attorney, he advocated for women serving on grand juries. Although he presented a technical defense of Delaware's segregated school system, he later became the first state attorney general to enforce the Supreme Court's decision. In 1959 Young entered private practice.

(Courtesy of Widner University School of Law)



**Milton Korman**

Milton Korman defended the District of Columbia. A graduate of Georgetown University law school, he served as corporation counsel, or chief legal officer, for the D.C. government for several years prior to the Supreme Court case. He claimed that the question of segregation in the city schools was beyond the Court's jurisdiction and that only Congress had the authority to legislate for Washington, D.C. Later he was appointed to the D.C. Superior Court.

(Courtesy of Martin Luther King Jr., Memorial Library, Washingtoniana Division)

**Retrieved 12-12-2010 from the *Smithsonian Institution* at:  
<http://americanhistory.si.edu/brown/history/5-decision/defenders.html>**

## Appendix V

### Attorneys Arguing Against Segregated Public Schools In *Brown v. Board of Education*

#### The Challengers of Segregation

The civil rights lawyers of the NAACP Legal Defense Fund were younger than their adversaries and had far fewer resources to prepare their cases. Much of their work was done at the law schools of Howard and Columbia universities.

The Plessy v. Ferguson decision, they argued, had misinterpreted the equal protection clause of the Fourteenth Amendment—the authors of this amendment had not intended to allow segregated schools. Nor did existing law consider the harmful social and psychological effects of segregation. Integrated schools, they asserted, were a fundamental right for all Americans.



**Thurgood Marshall**

Thurgood Marshall coordinated all of the plaintiff attorneys and presented arguments in the South Carolina case. A graduate of Howard University School of Law, he was the director

counsel of the NAACP Legal Defense Fund. After the Brown case, he argued several other civil rights cases before the Supreme Court.

From 1961 to 1965 Marshall served as a judge for the U.S. Court of Appeals for the Second Circuit and as solicitor general from 1965 to 1967. In that year President Lyndon Johnson appointed him to the U.S. Supreme Court, where he served until his retirement in 1991.

(Courtesy of Library of Congress)



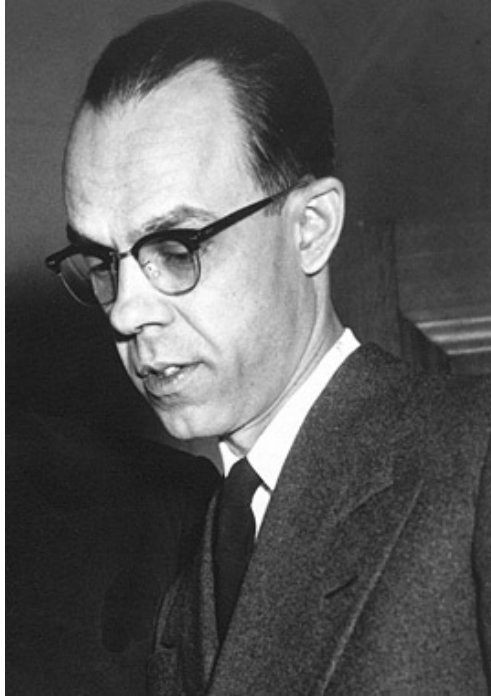
**Robert Carter**

Robert Carter presented the arguments in the Kansas case. He attended Howard University School of Law and completed graduate studies at Columbia University. After encountering widespread racism in the army during World War II, he decided to join the NAACP legal team in 1944 and became Marshall's key assistant.

From 1956 to 1968 Carter became the general counsel of the NAACP where he continued to be an aggressive advocate for civil rights. In 1972 he was appointed U.S. District Court judge for the Southern District of New York.

(Courtesy of Library of Congress)





**Spottswood W. Robinson III**

Spottswood W. Robinson III argued the Virginia case. A graduate of Howard University School of Law, Robinson entered private practice with his partner, Oliver W. Hill, in 1939. At one point, Robinson and Hill had ongoing lawsuits with 75 school districts. Robinson was appointed dean of Howard's law school in 1960. In 1966 he was named chief judge of the U.S. Court of Appeals and served until his retirement in 1989.

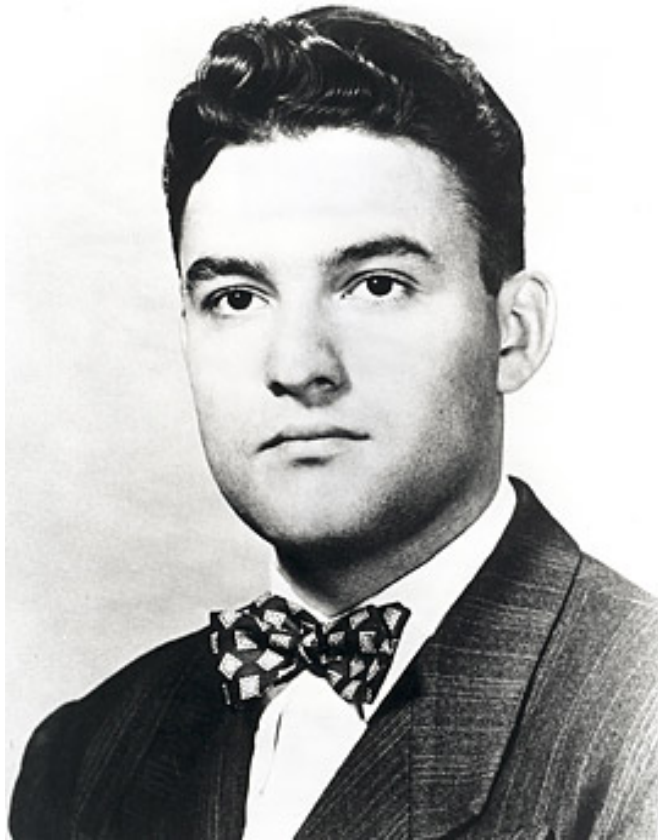
(Courtesy of Library of Congress)



**Louis L. Redding**

Louis L. Redding presented a portion of the arguments in the Delaware cases. He graduated from Harvard Law School in 1929 and became Delaware's first African American attorney. After the 1954 decision, he continued his legal practice in Wilmington and his commitment to defending civil rights cases. For the rest of his life, he was considered Delaware's leading civil rights attorney.

(Courtesy of Library of Congress)



**Jack Greenberg**

Jack Greenberg presented part of the arguments in the Delaware cases. He graduated from Columbia Law School in 1948. After Brown, Greenberg eventually replaced Thurgood Marshall as the leading counsel of the NAACP Legal Defense Fund.

In 1968 he helped found the Mexican-American Legal Defense and Education Fund and since then has helped establish other global humanitarian organizations. In recent years, Greenberg has written several books and is currently professor emeritus at Columbia Law School.

(Courtesy of Library of Congress)





**George E.C. Hayes**

George E. C. Hayes argued the first portion of the Washington, D.C., case. A graduate of Howard University's law school in 1918, he was for many years a faculty member there, as well as chief legal counsel for the university. He also served on the District of Columbia school board.

After *Bolling v. Sharpe*, Hayes argued several civil rights and civil liberties cases. In 1954 he represented Annie Lee Moss, a black woman falsely accused of being a Communist, before Senator Joseph McCarthy and the House Un-American Activities Committee.



**James Nabrit, Jr.**

James Nabrit Jr. argued the second part of the Washington, D.C., case. A graduate of Northwestern University Law School, he joined Howard's law faculty in 1936 and helped establish the school's coursework in civil rights law. He served as president of Howard University in the 1960s and deputy ambassador to the United Nations in 1966.

(Courtesy of Library of Congress)

**Retrieved 12-12-2010 from the *Smithsonian Institution* at:  
<http://americanhistory.si.edu/brown/history/5-decision/challengers.html>**

## Appendix W

### Ratification of the United States Constitution By Popularly Elected Delegates to the State Ratifying Conventions

The Constitutional Convention adjourned on September 17, 1787, following the unanimous approval of the state delegations and the signing of the Constitution by the delegates (Rossiter, p. 234). On September 19th, the *Pennsylvania Packet* devoted its entire issue to publishing the Constitution in its entirety (Bowen, p. 268). Without mentioning the word “Constitution,” Congress enacted a resolution on September 28, 1787, which directed “that the said report ... be transmitted to the several legislatures in order to be submitted to a convention of delegates chosen in each state by the people thereof” (Bowen, p. 269; Rossiter, p. 275). This resolution followed the content of Article VII of the newly proposed Constitution that required “[t]he Ratification of the Conventions of nine States.”

Article VII of the Constitution more fully stated, “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” On July 2, 1788, after the constitutional ratification requirement had been met, Congress appointed a “committee of five to ‘report an act ... for putting the new Constitution into operation’” (Rossiter, p. 300). On September 13, 1788, Congress established the date for electing the new government as well as the date “for ‘commencing proceedings’ as a more perfect Union,” the latter being March 4, 1789 (Rossiter, p. 300).

As can be seen from the table following these remarks, neither North Carolina nor Rhode Island approved the Constitution until after one of the following stages had been implemented for amending the Constitution to include a Bill of Rights: 1) a Bill of Rights had been proposed to the First Congress in April, 1789 by James Madison, who drew largely on the work of fellow

Virginian George Mason's "Declaration of Rights" that was a part of Virginia's Constitution of 1776; 2) a Bill of Rights had been approved by the same Congress by the necessary two-thirds majority in each legislative chamber on September 25, 1789; and 3) the Constitutional amendment regarding the Bill of Rights had been ratified by the required three-fourths of the nation's state legislatures (December 15, 1791 (Hall, 1992, pp. 70-71). Regarding the specific provisions of the Bill of Rights sent to the state legislatures, Congress had proposed twelve amendments. A noted constitutional historian described the situation:

The first two of these twelve proposals, which dealt with the troublesome issues of the scale of representation in the House and the compensation of members of Congress, fell mercifully by the wayside on their journey through the state legislatures. The remaining ten, the most important of which defended the ancient rights of persons against Congress and acknowledged the reserved powers of the states, became part of the Constitution... (Rossiter, p. 303)

On a note of interest, Vermont was admitted as a state after the Constitution was ratified, but prior to the approval of the Bill of Rights. Thus there were fourteen states in the United States when the Bill of Rights was being considered. Eleven of the fourteen state legislatures approved what became the first ten amendments to the Constitution. The three remaining states (Connecticut, Massachusetts, and Georgia) waited until 1791 when the nation celebrated the sesquicentennial of the Bill of Rights to add "their hitherto withheld and unneeded assent" to the first ten constitutional amendments known as the Bill of Rights (Rossiter, p. 303). The table indicating the dates that the popularly elected ratifying conventions took action in the original thirteen colonies regarding the U.S. Constitution, along with two sources for vote totals for and against the Constitution's adoption, is located on the following page.

<u>STATE</u>	<u>DATE APPROVED</u>	<u>VOTE: (Bowen; Rossiter)</u>	
1. Delaware	December 6, 1787	Unanimous	30 – 0
2. Pennsylvania	December 12, 1787	46 – 32	46 – 32
3. New Jersey	December 16, 1787	Unanimous	38 – 0
4. Georgia	January 2, 1788	Not Given	26 – 0
5. Connecticut	January 4, 1788	128 – 42	128 – 40
6. Massachusetts	February 5, 1788	187 – 168	187 – 168
7. Maryland	April 26, 1788	63 – 11	63 – 11
8. South Carolina	May 12, 1788	149 – 146	149 – 73
9. New Hampshire	June 21, 1788	57 – 46	57 – 47
10. Virginia	June 25, 1788	89 – 79	89 – 79
11. New York	July 26, 1788	30 – 27	30 – 27
12. North Carolina	November 21, 1789	Not Given	194 – 77
13. Rhode Island	May 29, 1790	Not Given	34 – 32

**Sources for the information contained in the preceding table are:  
Bowen, pp. 277, 290, 293-294, 304, 306; Brogan, pp. 209 & 209, n.  
12; Rossiter, pp. 285-286, 289-290, 294, 303.**

## Appendix X

### Ratification of the Eleventh Amendment By the Legislatures of the Fifteen States

<u>STATE</u>	<u>Date Approved: Mathis / Jacobs</u>		<u>Date Sent to Congress</u> <sup>1</sup>
1. New York	03-27-1794 <sup>2</sup>	SAME <sup>3</sup>	November 21, 1794 <sup>4</sup> January 8, 1795 <sup>5</sup>
2. Rhode Island	03-31-1794 <sup>2</sup>	Mar-Apr., 1794 <sup>6</sup>	January 29, 1796 <sup>7</sup>
3. Connecticut	05-08-1794 <sup>2</sup>	05-14-1794 <sup>8</sup>	January 8, 1798 <sup>9</sup>
4. New Hampshire	06-16-1794 <sup>2</sup>	SAME <sup>10</sup>	February 17, 1795 <sup>11</sup>
5. Massachusetts	06-26-1794 <sup>2</sup>	06-14-1794 <sup>12</sup>	January 8, 1795 <sup>5</sup>
6. Vermont	10-9/11-9-1794 <sup>2</sup>	10-28-1794 <sup>13</sup>	January 8, 1795 <sup>5</sup>
7. Virginia	11-18-1794 <sup>2</sup>	SAME <sup>14</sup>	January 8, 1798 <sup>9</sup>
8. Georgia	11-29-1794 <sup>2</sup>	SAME <sup>15</sup>	February 25, 1795 <sup>16</sup>
9. Kentucky	12-07-1794 <sup>2</sup>	12-08-1794 <sup>17</sup>	January 8, 1798 <sup>9</sup>
10. Maryland	12-26-1794 <sup>2</sup>	SAME <sup>18</sup>	January 8, 1798 <sup>9</sup>
11. Delaware	01-23-1795 <sup>2</sup>	01-30-1795 <sup>19</sup>	March 2, 1795 <sup>20</sup>
12. North Carolina	02-07-1795 <sup>2</sup>	SAME <sup>21</sup>	January 29, 1796 <sup>7</sup>
13. South Carolina	12-04-1797 <sup>2</sup>	SAME <sup>22</sup>	January 8, 1798 <sup>9</sup>

#### Legislatures Refusing to Ratify the Eleventh Amendment (in alphabetical order):

New Jersey<sup>23</sup>

Pennsylvania<sup>23</sup>

Tennessee (after being admitted as a state in 1796)<sup>23</sup>

1. All communications to Congress regarding state ratification of the Eleventh Amendment went from the states to the President of the United States, who then forwarded the letter to each congressional chamber. Dates of submission prior to March, 1796 would be letters sent to President George Washington and forwarded by him to Congress. Dates after March 1796 were communications to Congress from President John Adams. The listed communication date is the date that Congress officially noted receipt of the communication from the President in its record, contained in the *Annals of Congress*. The source for each date will first list the source for the Senate action followed by the source for action taken by the House of Representatives.
2. Mathis, 1968, p. 227, n. 77. Mathis's dates are derived from the following collection in the National Archives: "Documents Relating to the Proposal and Ratification of the Eleventh Amendment. Ratified Amendments, National Archives, Record Group 11."
3. Jacobs, p. 180, n. 95 (*Journal of the Assembly of the State of New York* {17th sess., January 1794}, pp. 177-178).
4. *Annals of Congress*, 4, pp. 795, 894. The letter from President Washington mentioned copies of a letter from the Governor of New York as well as the legislative act approving the Eleventh Amendment.
5. *Annals of Congress*, 4, pp. 809, 1063. Washington's letter mentioned:

copies of Acts passed by the Legislatures of the States of Vermont, Massachusetts, and New York, ratifying the amendment proposed by the Senate and House of Representatives at their last session, to the Constitution of the United States, respecting the Judicial power thereof.

Washington's letter also dealt with other matters, which included a communication from France regarding "Weights and Measures," a letter about problems in the judicial system of the Western Territory from the governor of that territory, and a letter reporting judicial problems in the "District of Pennsylvania" that required the attention of Congress.

6. Jacobs, p. 180, n. 96 (*Journal of the House of Magistrates*, 1794).
7. *Annals of Congress*, 5, pp. 41, 273. Washington's letter dealt with eight enumerated points. The first point mentioned that he was sending "for the information of Congress – 1. An Act of the Legislature of the State of Rhode Island, ratifying an amendment to the Constitution of the United States, to prevent suits in certain cases against a State." The second point of the same letter referenced "An Act of the State of North Carolina, making the like ratification."
8. Jacobs, p. 180, n. 96 (*Records of the States of the United States*).
9. *Annals of Congress*, 7, pp. 481, 483, 784-785, 809. Two communications were made by President Adams to Congress in early 1798. The first informed Congress that he would shortly have a report to submit to them from the Secretary of State [Timothy Pickering] regarding actions taken by the "States of Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, Kentucky, Tennessee, and South Carolina" on January 1, 1798 (*Annals of Congress*, 7, pp. 481, 784-785). This list serves as a roll call of the states for which no

information had yet been received by either the President or Congress regarding action taken with regards to the Eleventh Amendment. The second communication from President Adams to Congress occurred one week after the preceding letter. On January 8, 1798, President Adams wrote Congress that he was

transmitting to Congress a report of the Secretary of State, with a copy of an Act of the Legislature of the State of Kentucky, consenting to the ratification of the amendment of the Constitution of the United States, proposed by Congress in their resolution of the second day of December, 1793, relative to the suability of States. (Annals of Congress, 7, pp. 483, 809)

Although he was the President of the Senate (being Vice President in Washington's Cabinet) at the time that the Amendment had been approved by Congress on March 4, 1794, Adams got the date wrong in his 1798 communication to Congress. Without mentioning the states he had listed in his letter one week earlier, President Adams simply informed Congress that the "amendment having been adopted by three-fourths of the several States, may now be declared to be a part of the Constitution of the United States" (Annals of Congress, 7, pp. 483, 809). However, of the states listed in Adams' first communication, only Connecticut, Maryland, Virginia, and South Carolina (not to mention Kentucky as its legislative action was specifically mentioned by Adams in his second communication) ratified the Eleventh Amendment (See first page, second column of Appendix V). Both Pennsylvania and New Jersey legislatures opposed the Eleventh Amendment while the Tennessee legislature took no action. The positive actions taken to approve the Eleventh Amendment by state legislatures in Connecticut, Maryland, Virginia, and South Carolina were never directly communicated to Congress. Kentucky's action was communicated to Congress via the President via the Secretary of State.

10. Jacobs, p. 180, n. 96 (*Journals of the Senate of New Hampshire*, 1794).
11. *Annals of Congress*, 4, pp. 826, 1230. President Washington forwarded both "copies of a Letter from the Governor of the State of New Hampshire, and of an Act of the Legislature thereof..."
12. Jacobs, p. 180, n. 96 (*Journal of the House of Representatives* {15th sess.}, p. 102).
13. Jacobs, p. 180, n. 96 (*Journal of the Proceedings of the General Assembly*, 1794, p. 179).
14. Jacobs, p. 180, n. 96 (*Journal of the House of Delegates*, 1794, p. 20).
15. Jacobs, p. 180, n. 96 (*Executive Department Minutes*, in Julia M. Bland, *Georgia and the Federal Constitution* [Washington: Department of State Publication 1078, 1937], pp. 16-18).
16. *Annals of Congress*, 4, pp. 835, 1253. The Senate record included the actual text of the letter from President Washington, while the House record, for the first time, did not include the text. Instead, the House record simply summarized the letter's content.
17. Jacobs, p. 180, n. 96 (*Journal of the House of Representatives*, 1794, p. 34).
18. Jacobs, p. 180, n. 96 (*Votes and Proceedings of the Senate of the State of Maryland*, 1794, p. 52).



19. Jacobs, p. 180, n. 96 (*Journal of the House of Representatives*, 1795, p. 52).
20. *Annals of Congress*, 4, pp. 847, 1275. The Senate record included the actual text of the letter from President Washington, while the House record, for the second time, did not include the text. Instead, the House record simply summarized the letter's content.
21. Jacobs, p. 180, n. 96 (*Journal of the House of Commons*, 1794-1795, p. 38).
22. Jacobs, p. 181, n. 99 (*Journal of the Senate*, 1797, p. 68).
23. Jacobs, p. 67; Mathis, 1968, p. 227, n. 77; Warren, p. 101.

## Appendix Y

### Lawsuits Challenging State Actions Prior to the Recognized Adoption of the Eleventh Amendment

#### ORGANIZATION OF CASES

- I. Claims for Payment Against the State.
  - A. *Vanstophorst v. Maryland* (1791).
  - B. *Oswald v. New York* (1793).
  - C. *Cutting v. South Carolina* (1796).
- II. Lawsuits Challenging the State's Disposition of Public Lands.
  - A. *Grayson v. Virginia* (1792), a.k.a. *Hollingsworth v. Virginia*, a.k.a. *Indiana Company v. Virginia*.
  - B. *Moultrie v. Georgia* (1797), a.k.a. *Huger v. Georgia*, a.k.a. *Huger v. South Carolina*.
- III. Legal Battles Pitting Patriots Against Tories.
  - A. *Rutgers v. Waddington* (1784).
  - B. *Vassal v. Massachusetts* (1793).
  - C. *Brailsford v. Spalding* (1792); *Georgia v. Brailford* (1794).
  - D. *Ware v. Hylton* (1796)

#### Claims for Payment Against the State

*Vanstophorst v. Maryland*, 2 U.S. (Dallas) 401 (1791), was the “first suit filed against a state by individuals in the Supreme Court” (Mathis, 1968, p. 215). Jacobs noted the following regarding the reporting of the Court’s earliest cases, particularly those reported on by Dallas: “The records in Dallas are fragmentary and inaccurate, and several of the early cases are not reported at all. Much of the factual material concerning these cases was taken from the official minutes and dockets of the Supreme Court” (Jacobs, p. 174, n. 6).<sup>179</sup> In his analysis, Mathis used the official minutes and dockets of the case as filed in the National Archives (See Mathis, 1968, p. 215, n. 28).

The suit was brought by Dutch financiers who had loaned the state £40,500 in 1782 (Jacobs, p. 43). Apparently the Maryland legislature subsequently “annulled the contract” shortly after the loan was negotiated because it viewed the loan’s terms as being “disadvantageous” to Maryland (Jacobs, p. 43). Although the legislature had directed the loan funds to be returned, the refund had not been made when the suit was filed. The Dutch bankers “sought recovery of principal, interest, and damages on [the] loan” (Jacobs, p. 43). Both parties agreed to continue the case until the next term so that a commission could be appointed “to take depositions from certain witnesses residing in Holland (Jacobs, p. 44; see also Mathis, 1968, p. 215). At the same time “out-of-court negotiations looking toward a compromise settlement were undertaken” that resulted in a motion by both the plaintiffs and defendants to discontinue the case with “each party agreeing to pay his own costs” (Jacobs, p. 44).

*Oswald v. New York*, 2 U.S. (Dallas) 401 (1792); 2 U.S. (Dallas) 415 (1793) involved legal actions, the details of which were not reported by Dallas, the Court’s reporter. Jacobs noted the following:

The facts of *Oswald v. New York* were not reported by Dallas. The background of the case has been reconstructed from the *Oswald v. New York* case file in the National Archives. The file is incomplete, however, and many of the documents were badly damaged by fire. (Jacobs, p. 174, n. 13)

Jacobs’ note might explain the confusion emanating from two scholars citing the same case in different fashion while using the same records housed in the National Archives. Jacobs cited the case as 2 Dall. 401 (1792) while Mathis cited the case as 2 U.S. (2 Dall.) 415 (1793) (See Jacobs, p. 174, n. 13; Mathis, 1968, p. 215, n. 31; and Mathis, 1968, p. 216, n. 32). Confusion may have resulted from the confusing record of multiple actions taken at various times by the Court, a case described as having “caused the Court considerable embarrassment” (Jacobs, p. 45).<sup>180</sup> Both scholars, however, reached substantial agreement on the facts and disposition of the case.

In 1776 the New York legislature selected John Holt to be the state's official printer (Jacobs, p. 45; Mathis, 1968, p. 215). After his death, his widow was selected by the state to do the state's printing. After printing some materials for the state, Elizabeth Holt received two payments, but "claimed she did not receive a just settlement" for her work (Mathis, 1968, p. 216). Jacobs stated that part of the disagreement stemmed from a "substantial sum" that the state had owed John Holt when he died (Jacobs, p. 45). Elizabeth Holt died before the suit reached the Supreme Court, thus leaving Eleazer Oswald (a resident of Pennsylvania who served as the executor of the Holt estate) to push the suit forward. The suit finally concluded in 1795 when the Holt estate was awarded "\$5,315 in damages" (Mathis, 1968, p. 216).

*Cutting v. South Carolina* does not have a standard citation as it was a case "not described in the Dallas reports; however, it is listed in Docket 31, there are several references to it in the Minutes and there is a Case File in the National Archives" (Mathis, 1968, p. 228, n. 78). Warren referred to the case as *Caitlin v. South Carolina* in two separate references, stating that it was located "in the official records" (Warren, p. 99, n. 2; see also Warren, p. 104, n. 2 and Jacobs, p. 179, n. 79). The case represents a lawsuit filed against a state by a noncitizen. Both the facts of the case and its procedural record painted an intricately complicated picture:

John Brown Cutting, a citizen of Pennsylvania, was administrator for the Prince of Luxembourg. The suit arose over a ship contracted for use in the American Revolution. The ship was to be built for the United States in Holland but was sold instead to France, and France had allowed Luxembourg to use it. A South Carolinian made an agreement with the Prince of Luxembourg for the use of the ship for three years by the state of South Carolina. The ship was put into service by South Carolina but was later captured by the British. The Prince of Luxembourg attempted to recover for the loss of the ship and, not succeeding otherwise, a suit was brought in the United States Supreme Court against the state of South Carolina. (Mathis, 1968, p. 228)

South Carolina “acknowledged its indebtedness, but withheld payment” because ownership of the ship was complicated by a claim presented to South Carolina by the French Republic that it owned the boat, not the Prince of Luxembourg (Jacobs, p. 62). Following both the governor’s refusal to accept the Court’s writ and the failure of South Carolina to appear before the Court, “the Supreme Court entered a default judgment in February 1797” (Jacobs, p. 63). A jury impaneled by the Court on August 8, 1797, conducted an “inquiry of damages” and “gave a verdict of \$55,002.84 damages for the plaintiff” (Mathis, 1968, p. 228).

South Carolina was granted an injunction “to stay execution of the judgment” provided “that the state deposit in Court the amount of the judgment” (Jacobs, p. 63). Following this pronouncement, the record became murky. Jacobs noted that it wasn’t “clear whether the state satisfied this condition;” he further noted that there was “no record that a writ of execution [was] issued” by the Court (Jacobs, p. 63). Jacobs pointed out that the Court “directed a continuance of *Cutting v. South Carolina*” in February 1798 and observed that “[o]ther cases in which states had been sued by individuals were at the time dismissed upon the basis of the Eleventh Amendment” (Jacobs, p. 63). After the action taken in February 1798 to continue the case, the Court record became silent, according to Jacobs, who commented, “The later record is silent as to the ultimate disposition of the case” (Jacobs, p. 63). Jacobs opined that the case hadn’t been officially dismissed “because the Eleventh Amendment did not, by its terms, preclude actions instituted by a foreign state or sovereign against a nonconsenting state” (Jacobs, p. 63). In a separate note, Jacobs pointed to subsequent action regarding the question by a twentieth-century Court:

Many years later, in *Monaco v. Mississippi*, 292 U.S. 313 (1934), the Court held that the judicial power of the United States under Art. III, sec. 2, of the Constitution did not extend to suits instituted against a nonconsenting state by a foreign state or sovereign. (Jacobs, p. 179, n. 82)

Both Jacobs and Mathis cited similar dates for minutes of the Court from *Cutting v. South Carolina*, which Mathis indicated were contained in Docket 31 (Mathis, 1968, p. 228, n. 78 & n. 79). Mathis, however, located minutes for the case *South Carolina v. French Republic, and Cutting* that were contained in Docket 49 and reported, “Before the case could be concluded, the eleventh amendment had been ratified and the Court no longer had jurisdiction” (Mathis, 1968, p. 228, n. 80).

### **Lawsuits Challenging the State’s Disposition of Public Lands**

*Indiana Company v. Virginia*, a case not reported by Dallas, *Grayson v. Virginia*, 3 U.S. (3 Dallas) 320 (1796); and *Hollingsworth v. Virginia*, 3 U.S. (3 Dallas) 378 (1798), all represent different legal activities of the same initial lawsuit first filed in 1792 (Gibbons, p. 1904; Jacobs, pp. 57-58; Mathis, 1968, pp. 225, 229-230; Warren, I, pp. 91-92). The issue was land ownership and began with the Treaty of Fort Stanwix in 1768 that was negotiated by the British government with various Indian tribes while Virginia was still a colony of Great Britain. Under the terms of the treaty, either “1.8 million acres” or “approximately three million acres” of land in western Virginia was ceded by the tribes to the Indiana Company “as reparation for having seized and carried off property valued at nearly a quarter million dollars” (Gibbons, p. 1904; Jacobs, pp. 57-58; Jacobs, p. 58). The Indiana Company, “a group of fur traders,” quickly became a “land company” with its newly acquired holdings from the Indian tribes by way of the British government (Jacobs, p. 58; Warren, I, p. 92).

After acquiring status as one of the said states who formed the confederacy known as the United States of America through the Articles of Confederation, the Virginia legislature in 1779 voided the 1768 Fort Stanwix Treaty’s conveyance of land from the tribes to the British Crown to the Indiana Company, citing the “‘sea to sea’ charter of 1609, thus finding the conveyance to

be part of the state's public domain" (Gibbons, p. 1904, n. 72). Virginia then refused to recognize the grants of land that had been made by the Indiana Company in the land that Virginia now claimed as part of its public domain (Mathis, 1968, p. 229). Shareholders of the Indiana Company "sought unsuccessfully to obtain redress from the Continental Congress," unsuccessful because the only action taken by Congress was to adopt "an ineffectual resolution imploring Virginia to refrain from making conveyances of the disputed lands," a resolution that was "ignored" by the Virginia legislature (Gibbons, p. 1904; Gibbons, p. 1904, n. 73; Jacobs, p. 58). Virginia subsequently passed legislation that divided the disputed land into "local governmental units" and that also authorized the state land office "to sell the land, with receipts accruing to the state" (Jacobs, p. 58). After more failed efforts by the Indiana Company "to obtain compensation for Virginia's confiscation," the Indiana Company's shareholders, "some ninety persons, most of them citizens of Pennsylvania," initiated legal action in August 1792 in the U.S. Supreme Court by filing "a bill in equity asking relief either in the sum of \$1,128,000 (the estimated sale value of the land) or in the amount of \$233,000 (the value of the property seized by the Indians)" (Gibbons, p. 1904; Jacobs, p. 57; Jacobs, p. 58).<sup>181</sup>

Virginia's governor was in Philadelphia when the Court announced its decision in *Chisholm v. Georgia*, and in a letter to the lieutenant governor:

he predicted that a judgment in favor of the Indiana Company would be rendered at the next term of the Court if Virginia followed the example of Georgia and failed to enter an appearance. He also stated that he had suggested to the state's congressional delegation the propriety of an explanatory constitutional amendment concerning the federal judicial power. (Jacobs, p. 59)

The lawsuit by the Indiana Company raised fears in Virginia that other land issues would be subjected to judicial scrutiny. One such issue centered on the state's disposition of the land claims "of the late Judge Richard Henderson, who had attempted unsuccessfully to create the

proprietary state of Transylvania in the Cumberland region of Kentucky, then a part of Virginia” (Jacobs, p. 59). Another questionable transaction involved Virginia’s confiscation of Lord Fairfax’s lands which had been enacted by the Virginia Assembly well after the treaty of peace had been negotiated with Great Britain ending the Revolutionary War, an article of which stipulated that “there should be no further confiscations” (Gibbons, p. 1905, n. 76). Since Article VI of the recently adopted Constitution stipulated that treaties were to “be the supreme Law of the Land,” since Fairfax had clear title to the land prior to Virginia’s confiscation, and since the confiscation occurred after the treaty article had been approved by Congress, Virginia officials had good reason to be fearful. As one law professor noted:

The dispute over the Fairfax lands, though recognized immediately, was to be in litigation for more than two decades. Eventually it precipitated the first great challenge by a state court to the reviewing authority of the Supreme Court. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 379 (1813); *Hunter v. Martin, Devisee of Fairfax*, 18 Va. (4 Munf.) 11 (1815); *Hunter v. Fairfax’s Devisee*, 15 Va. (1 Munf.) 90 (1810)... (Gibbons, p. 1905, n. 76)

The Indiana Company’s lawsuit “was taken up by the Court each year between [the filing of the suit] and 1798” (Mathis, 1968, p. 229). During this same period of time the Eleventh Amendment was being proposed, developed, and sent to the states by Congress for adoption. Finally, after President Adams informed Congress that the Eleventh Amendment had been ratified by the required number of states, the Court dismissed the Indiana Company’s lawsuit on February 14, 1798, stating, “The Court is of opinion, that, on consideration of the Amendment of the Constitution respecting suits against States, it has no jurisdiction of the Cause” (*Hollingsworth v. Virginia*, 3 U.S. 378).

***Moultrie v. Georgia*** was “not described in the Dallas reports” (Mathis, 1968, p. 228, n. 81). Professor Mathis provided further explanation:



[H]owever, it [*Moultrie v. Georgia*] is listed in Docket 32; there are several references to it in the Minutes; and there is a Case File in the National Archives. The entry in the Minutes, Feb. 10, 1797, lists *Huger v. Georgia*; however, the date, the information and the names involved are the same as given under *Moultrie v. Georgia* in Docket 32. Isaac Huger was one of the members of the South Carolina Yazoo Company bringing the suit. (Mathis, 1968, pp. 228-229, n. 81)

Mathis continued to provide further information about the confusion of names that he uncovered during his historical research, an investigation that also shed light on the state of affairs prior to the implementation of more standardized procedures for reporting the Court's actions:

In the Court reports there is a case called *Huger v. South Carolina*, 3 U.S. (3 Dall.) 339 (1797); however, there is no mention of this case in the Minutes or the Docket and there is no Case File among the Court records in the National Archives. It appears quite likely the case listed by Dallas as *Huger v. South Carolina* is the one listed as *Moultrie v. Georgia* on the Docket and supported by a Case File. (Mathis, 1968, p. 229, n. 81)

However the case was named, it was an intriguing lawsuit dealing with the Yazoo Company that featured land fraud, breach of contract, and bribery of state legislators, all of which centered on Georgia's claims to and disposition of public lands between the Mississippi River (the western border) and the Tombigbee River (the eastern border). When one realizes that the land claim occupied much of the current-day state of Mississippi in addition to a small western slice of Alabama, one gains a sense of the unbounded greed for land at the time.

The situation began its movement towards legal conflict in 1789 when the Georgia legislature passed the first Yazoo Act whereby "nearly 16 million acres of western lands claimed by the state" were sold "to the Virginia, South Carolina and Tennessee Yazoo Companies" (Jacobs, pp. 63-64; Mathis, 1968, p. 229). The total price of the purchase amounted to \$200,000 and "was to be paid within two years" (Jacobs, p. 64). The share of the South Carolina Yazoo Company was "a little more than one-third" (Jacobs, p. 64). However, in 1790, the Georgia legislature unilaterally changed the terms of the contract by stipulating that the payment had to

be “in specie” (Jacobs, p. 64). Experiencing financial difficulty, the South Carolina Yazoo Company, unable to meet the changed requirement that payment be made in specie, submitted “paper money [and] other certificates in satisfaction of the price,” which the state treasurer “refused to accept” (Jacobs, p. 64). Viewing the contract as “no longer binding upon it,” the Georgia legislature then enacted another Yazoo Act in 1795 that “sold a part of the tract to other parties, who in turn conveyed [it] to the New England Company” (Jacobs, p. 64). The Yazoo Act of 1795 “was effected through widespread bribery of legislators, and its attempted rescission the following year set the state for *Fletcher v. Peck*, 6 Cranch 87 (1810)” (Jacobs, p. 179, n. 84).

Professor Mathis described the response of the South Carolina land company:

A bill in equity was then filed by Alexander Moultrie and other members of the South Carolina Yazoo Company with the Supreme Court of the United States to force completion of the sale, the acceptance of the money offered, and to stop the resale of the same land by the Georgia legislature... (Mathis, 1968, p. 229)

Mathis also summarized the Court’s actions: “The suit was heard by the Court in the February and August terms in 1797, and in the February term in 1798. On February 14, 1798, the suit was dismissed because of the ratification of the eleventh amendment” (Mathis, 1968, p. 229).

### **Legal Battles Pitting Patriots Against Tories**

*Rutgers v. Waddington*, unreported, N.Y. (1784), involved a challenge to the legitimacy of a state law regarding actions of Loyalists against New York citizens during the British occupation in the American Revolution and also served as “a marker on the long road that led to the ultimate formulation of the American doctrine of judicial review” (Goebel, p. 282). The Attorney General of New York served as the lead attorney for the plaintiff in the case while Alexander Hamilton headed a three-member team of attorneys for the defendant (Goebel, pp. 292-293). Elizabeth Rogers initiated the legal action when she “brought suit for damages under

the New York Trespass Act, which allowed people who had fled from the British army to recover damages from anyone who used the property during the British occupation” (Jacobs, p. 167, n. 21).

The facts of the case began with the British occupation of New York City during the summer of 1776 when many patriots, including Elizabeth Rutgers, fled the City. Abandoned property “was commandeered ‘ for the use of the army’ by the British Commissary General” (Goebel, p. 289). From August-September, 1776, until June 10, 1778, “the Rutgers brewery was one of the three within the city occupied by Royal troops and used for public purposes” (Goebel, p. 289, n. 19). In September, 1778, Mrs. Rutgers’ brewhouse and malt-house were assigned to two British merchants by the Commissary General. Joshua Waddington served as the agent for the merchants, Evelyn Pierrepont and Benjamin Waddington (Goebel, p. 289). Although they spent “about £700 in extensive repairs and added a necessary storehouse, a stable, and an inclosure [sic] for firewood,” they apparently occupied the property rent free until May 1, 1780” (Goebel, p. 290). On May, 1, 1780 the British Commander-in-Chief ordered everyone “occupying abandoned Patriot premises” to pay rent to a British agent “for the Vestry of the Poor” (Goebel, p. 291). Waddington and Pierrepont paid an annual sum of £150 rent to the British agent for the next three years.

On June 20, 1783, as the British were preparing to evacuate New York City, the British Commandant ordered Pierrepont and Waddington “to commence payment of rent to the owner’s agent, Anthony Rutgers, retroactive to May 1” (Goebel, p. 290). Immediately prior to the British evacuation of the city in November 1783, “a fire broke out that reduced the brewery ‘to ashes’ and cause the merchants a loss computed at ‘upwards of £4,000’” (Goebel, p. 291). Within a month, the two British merchants turned over the keys of the stable and storehouse to Rutgers.

Continuing negotiations for the amount of rent broke down, possibly because of prior passage by the New York legislature of the Trespass Act on March 17, 1783, the same date on which the “preliminary articles of a treaty of peace” were dispatched to Governor Clinton (Goebel, p. 288; see also pp. 287, 290-291). One of the “three major anti-Loyalist acts” passed by New York, the Trespass Act was described as “the one that most effectively accomplished the aims of the legislature,” largely because the number of lawsuits “under this statute far outnumbered those brought under either the Confiscation or the Citation Act” (Goebel, p. 282). A lawsuit to recover £8,000 in rent was filed in the Mayor’s Court of the City of New York by Elizabeth Rutgers against Joshua Waddington, the agent for the two British merchants (Goebel, p. 291). The lawsuit “was initiated at a moment when anti-Tory feeling was at a peak and when the state legislature, despite the Treaty of Peace, was confecting further punitive measures against the Loyalists” (Goebel, p. 291). As it was further noted, “*Rutgers* to the man in the street became a melodrama the plot of which involved an aged Patriot widow who was done out of her property by two prosperous British merchants” (Goebel, pp. 292-293).

Presenting their case before the Mayor’s Court on June 29, 1784, plaintiff arguments stressed state sovereignty (Goebel, p. 301). The attorneys for Rutgers argued that the case should be decided according to the terms of New York’s law, that the law of nations “did not bind the State of New York for it was not a part of the common law,” and that “even if the law of nations was a part of the common law, it was no more obligatory on the legislature than was the common law which itself did not bind the legislature” (Goebel, p. 303). Finally, Rutgers’ attorneys stressed two major points: first, “that the legislature as the supreme law-giving authority within the state was subject to no control except that of the people;” and second, “that the judges, as agents of the state owing primary allegiance to its laws, did not have the power or

authority to apply law from any other source or jurisdiction in derogation of those laws” (Goebel, p. 304).

As can be seen by comparing the preceding argumentation with the following defense arguments, Hamilton’s use of initial pleadings “had fixed the issues so that plaintiff’s counsel were forced to argue on Hamilton’s grounds” (Goebel, p. 304). Hamilton’s first line of argument “claimed the Trespass Act to be in violation of the law of nations” (Goebel, p. 304). He next cited the Treaty of Paris, which, when combined with the law of nations “implied ... a general amnesty for all public and private injuries arising from the war” that the individual states were obligated to respect (Goebel, p. 305). Hamilton’s third, concluding argument claimed “that if the Trespass Act were void for either of the above reasons, a state court had the power and the obligation to declare the statute void and to refuse to give it effect” (Goebel, p. 305). In support of his arguments for judicial review, Hamilton quoted “the rule of Cicero” governing determinations of legal primacy, which he presented in its original Latin and which he cited as “De In: L 4 No. 145:”

Primus Igitur leges oportet contendere comparando utra lex ad Majores hoc est ad utiliores ad honestiores ac magis necessaries res pertineat, ex quo confiscitur ut si legis duae aut sip lures aut quot quot erunt conservari non possunt quia discrepant inter se ea maxime conservanda sunt quæ ad maximas res pertinere videatur. (Goebel, p. 352)

H.M. Hubbell’s English translation of the same passage from Book II, 49, § 145 of *De*

*Inventione* reads as follows:

In the first place, then, one should compare the laws by considering which one deals with the most important matters, that is, the most expedient, honourable [sic] or necessary. The conclusion from this is that if two laws (or whatever number there may be if more than two) cannot be kept because they are at variance, the one is thought to have the greatest claim to be upheld which has reference to the greatest matters. (Cicero, 1949, p. 313)

Perhaps, due to the nature of his argument and his wish to be logically concise by citing an ancient rule of interpretation, Hamilton cited only this portion of Cicero's thought on legal matters. However, one wonders why Hamilton didn't cite from *De Legibus*, which contained several anticipations by Cicero of judicial review. For example, in Book II, 13 of *De Legibus*, Cicero had his main character ask, "What of the fact that many harmful and pernicious measures are passed in human communities – measures which come no closer to the name of laws than if a gang of criminals agreed to make some rules" (Cicero, 1998, p. 126)? After drawing an analogy between lawmaking and medical treatment, Cicero's alter ego, Marcus, answered his own question:

In a community a law of just any kind will not be a law, even if the people (in spite of its harmful character) have accepted it. Therefore law means drawing a distinction between just and unjust, formulated in accordance with that most ancient and most important of all things – nature;<sup>182</sup> by her, human laws are guided in punishing the wicked and defending and protecting the good. (Cicero, 1998, p. 126)

Or, Hamilton could have cited Cicero's thought from Book II, 31 of *De Legibus* when, nearing the end of a lengthy monologue, Cicero's alter ego asked a series of rhetorical questions, which contain two examples of laws being overturned:

What is more awesome than the power to grant or withhold the right to do political business with the people or plebs? Or than quashing laws illegally approved, as when the Titian Law was annulled by the decree of the college, or when the Livian Laws were cancelled on the recommendation of Philippus who was both consul and augur? (Cicero, 1998, p. 134)

Perhaps the reason for Hamilton's citation of *De Inventione* and omission of *De Legibus* derived from Hamilton's own legal training, of which, one can surmise from the available evidence, *De Inventione*, but not necessarily *De Legibus*, must certainly have been a part.<sup>183</sup> Ability in rhetoric was highly prized, both by the ancients and by the nation's founders. The reasons for valuing

rhetoric can be ascertained partially from Hubbell's introduction to his translation of Cicero's *De Inventione*:

An ancient Rhetoric trained men entirely for speaking, and almost exclusively for speaking in the law court. It is a doctrine of controversy and debate. Furthermore, it is concerned with matter as well as with style. Invention, or the discovery of ideas and subject matter, was the first and perhaps the most important section of any formal treatise on rhetoric. In developing "invention" the authors are of necessity busied with the concepts and procedure of the court-room. A rhetoric thus becomes a "Practical Pleader's Guide." Hence much of the *de Inventione* reads like a law book. (Cicero, 1949, pp. ix-x)

One of Hamilton's principal biographers suggested a possible reason for Hamilton's limited use of Cicero when he differentiated between two types of argument put forth by Hamilton regarding judicial review. The first type focused on seeking "judicial review of the statute on grounds of incompatibility with higher law," which Hamilton supported with Cicero as noted previously (McDonald, 1979, p. 68). While Hamilton had made that argument, his real focus, according to McDonald, was "another and more effective ground" because it "undermined the ground on which plaintiff's case had been built" (McDonald, 1979, p. 68). McDonald continued:

Courts were regularly called upon, Hamilton said, to construe the meaning of the law as it applied to particular cases. The rules of construction were clear and well known. One of these was the supposition that the legislature is wise and honest; and thus if a narrowly literal reading of the language of a statute leads to an absurd, contradictory, or unjust application, it must be assumed that the legislature had not intended for the act to be read that way. (McDonald, 1979, p. 68)

Professor McDonald continued his analysis of Hamilton's legal argument:

Similarly, if the general language of one statute, read literally and without reference to circumstances, resulted in a conflict with the specific language of another statute or with the common law, it must be supposed that the legislature intended no such conflict. (McDonald, 1979, p. 68)

McDonald then explained how Hamilton had "undermined" the arguments used by plaintiff's attorneys.

Counsel for Mrs. Rutgers had argued for legislative supremacy over court decisions; and though Hamilton disagreed, he emphasized the question of presumed legislative intent, not judicial review, as the basis for a decision in favor of his client. That enabled the court to affirm plaintiff's position and disavow any power to overrule a statute (for this were to set the *judicial* above the legislative"), and yet at the same time do just that by ruling for Waddington. (Emphasis in original) (McDonald, 1979, p. 68)

The judgment of the court was not delivered until August 17, at which time it was "rendered without opinion" (Goebel, p. 306). On August 27, 1784, the court delivered its opinion, which appeared "to have been primarily the result of [Mayor James Duane's] own work and thought" (Goebel, p. 307). The Mayor's Court reasoned that: 1) the law of nations, as part of the common law, was a part of the New York Constitution; 2) the Revolutionary War was governed by the law of nations; 3) the resulting "capture of New York [was] such a conquest as to transfer the rights to rents to the British Commander during the occupation;" and that 4) the rights to rent were not, however, transferred to the Commissary General (Goebel, p. 308). Regarding the Treaty of Peace, the court stated that "although the treaty legally could not be violated by the state, it provided no express amnesty for the defendant" (Goebel, p. 308). Employing a bit of legal sleight of hand, the Mayor's Court reasoned that it "could not presume that the Trespass Act was intended to apply to the defendant in so far as he was justified and protected by the law of nations" (Goebel, p. 309). However, "whoever is *clearly exempted* from the operation of this statute by the law of nations, this Court must take it for granted, could never have been *intended* to be comprehended within it by the Legislature" (Emphasis in original) (Goebel, p. 309). In summary, the Mayor's Court held the following:

In so far as the defendant's occupation was not justified by the law of nations (1788-1780), his plea of military authorization would not avail him. On the other hand, the court construed the Trespass Act as not intended to apply to the defendant when his occupation was justified (1780-1783). (Goebel, pp. 309-310)



On September 2, 1784, a jury “awarded a verdict of 791 pounds, 13 shillings, 4 pence damages and 6 pence costs, to the plaintiff,” a verdict that the Mayor’s Court ordered “be the judgment of the court” (Goebel, p. 310). It was also a verdict well shy of the original mark of £8,000 sought by Mrs. Rogers when her attorneys filed the lawsuit.

*Vassall v. Massachusetts*, unreported, U.S.S.C. (1793), involved a potential clash between a state statute and the Treaty of Paris ending hostilities between Great Britain and the United States. A few months after the Court issued its *Chisholm* decision, William Vassall filed a “bill in equity” in August, 1793 against the Commonwealth of Massachusetts in the U.S. Supreme Court (Mathis, 1968, p. 224; see also Jacobs, p. 60 and Jacobs, p. 175, n. 25). Vassall, a Loyalist and British subject, had fled to England during the Revolutionary War. Subsequently his property had been confiscated by the state according to provisions of a state law that had been passed at the beginning of the rebellion (Jacobs, p. 60; Mathis, 1968, p. 224). After the suit was filed a federal marshal served subpoenas upon both Governor John Hancock and Attorney General James Sullivan. The *Massachusetts Mercury* commented on this circumstance in its July 16, 1793 edition:

The precept now served on the governor and Attorney General is for monies arising from the sequestered property of a refugee.... If he should obtain what he has sued for, what a wide extended door will it open for every dirty Tory traitor to his country’s liberties to enter. (Warren, pp. 99-100, n. 3)

Hancock reacted to the federal subpoena by “issuing a proclamation calling the legislature into special session in September” (Jacobs, p. 60). On September 18, 1793, Hancock’s address was read to a joint session of the legislature by the secretary of the commonwealth in Hancock’s presence as Hancock was “critically ill and too weak to stand,” (Jacobs, p. 60). Described as “a fiery speech” by one historian and as “surprisingly moderate in tone” by a legal scholar, Hancock’s address to the joint session of the Massachusetts’ legislature

presented the issues contained in the lawsuit and described “several alternatives which the legislature might pursue” (Mathis, 1968, p. 224; Jacobs, p. 61; Jacobs, p. 61). The critical issue for Vassall’s lawsuit, according to Governor Hancock, “turned on the legality of the state’s absentee laws” (Jacobs, p. 61). This, in turn, raised the issue of which court was empowered to address the legality of state law. Hancock expressed doubt “that the judicial power of the United States extended to matters of civil contract involving the states” (Jacobs, p. 61). However, if the federal judiciary’s power did extend to such a matter, “[W]hat law would be applicable” (Jacobs, p. 62)? The only choices, in Hancock’s view, were the Scylla of federal law, a situation that “would render the legislative authority of Congress over the particular states, as mere corporations commensurate to the claim of the judiciary power,” or the Charybdis of state/British law, a circumstance which “would be absurd” (Jacobs, p. 62).

Nine days later, the Massachusetts’ legislature issued its response to Governor Hancock in the form of a resolution directing “the United States Senators and Representatives from Massachusetts” to work for an amendment to the Constitution that would prohibit states from being “compellable to answer in any suit by an individual or individuals in any Court of the United States” (Mathis, 1968, p. 225). The resolution also directed Governor Hancock “to communicate the foregoing Resolutions to the Supreme Executives of the several States, to be submitted to the consideration of their respective Legislatures” (Mathis, 1968, p. 225). Nothing found by this investigator indicated that anyone in Massachusetts recognized that the Massachusetts’ confiscation law conflicted with provisions of the 1783 Treaty of Paris.

After examining the minutes of the case and taking into account the context of the historical circumstances, one scholar observed:

With action now imminent in Congress, the subsequent judicial history of *Vassall v. Massachusetts* was somewhat anticlimactic. There is no record of

the state's appearance. Neither the plaintiff nor the Court pressed for an early decision in the case, and, at successive terms of the Court, continuances were repeatedly granted until February 1797, when the case was dismissed. (Jacobs, p. 62)

*Brailsford v. Spalding*, unreported, U.S.C.C., Ga. (1792) and *Georgia v. Brailsford*, 2 U.S. (Dall.) 402 (1792), 2 U.S. (Dall.) 415 (1793, 3 U.S. (Dall.) 1 (1794), while appearing to be separate legal matters, share the same factual background and are connected actions. Following the Revolution, the Georgia legislature enacted a statute on May 4, 1782, that provided for the state confiscation of properties owned by Loyalists with the money from the sale of such properties being deposited into the Georgia Treasury (2 U.S. 402). The Georgia action also provided for the sequestration of all debts "due or owing to British merchants" (2 U.S. 402). The Georgia law did not abolish the debts; it simply took over the ownership of the debt. Under the terms of the Georgia law, instead of paying the debt to the British party with whom it was originally contracted, a citizen or business would pay the amount owing on the debt to the State of Georgia.

In 1791 three Loyalist merchants (Samuel Brailsford, Robert Powell, and John Hopton) filed suit in the U.S. "circuit court for the district of Georgia" to collect on a debt owed them by James Spalding, a Georgia Patriot (2 U.S. 402, 403). After the lawsuit had been filed, the Georgia Attorney General "applied to the circuit court, for the admission of the state, as a party, to defend its claim" under the previously passed Georgia statute to the debt claimed by the loyalist merchants (2 U.S. 402, 403). The circuit court rejected the state's application and ruled for the merchants.

Following the circuit court's ruling, the State of Georgia "filed in the Supreme Court an original bill in equity to enjoin execution of the circuit court's judgment in favor of the creditor"

(Jacobs, p. 177, n. 56). The confluence of *Georgia v. Brailsford* and *Chisholm v. Georgia* caused one legal expert to remark:

Thus, while complaining in the *Chisholm Case* because it had been made a party to a suit by a British creditor, Georgia was complaining in the *Brailsford Case* because it had not been allowed to become a party in another suit by a British creditor. (Warren, p. 103)

The opposing attorneys arguing before the Supreme Court for and against the injunction were Alexander J. Dallas, entrepreneurial Court reporter, and Edmund Randolph, formerly the Governor of Virginia, a delegate to the Constitutional Convention who presented the Virginia Plan to that body, a staunch constitutional proponent in the Virginia convention to ratify the Constitution, and, at the time of his appearance before the Court, the U.S. Attorney General.<sup>184</sup> Justices Johnson and Cushing issued *seriatim* opinions opposing the injunction while Justices Iredell, Blair, Wilson, and Chief Justice Jay issued *seriatim* opinions favoring the granting of an injunction. Thus, by a 4-2 margin, the Court granted Georgia's request for an injunction during the August, 1792 term of the Court (2 U.S. 402, 405-408). According to the Chief Justice, "For my part, I think, that the money should remain in custody of the law, until the law has adjudged to whom it belongs; and, therefore, I am content, that the injunction issue" (2 U.S. 402, 408).

The following Court term (February, 1793), the matter was again before the Court as Randolph presented a motion "to dissolve the injunction which had been issued, and to dismiss the bill" (2 U.S. 415). After hearing argument, the Court issued its 3-2 opinion (Justices Iredell and Blair dissenting, Justice Johnson being absent, Justices Wilson and Cushing, along with Chief Justice Jay, forming the majority) whereby the Court ruled that Georgia had a right to pursue the debt "at common law" and that the injunction be continued "until the next term; when, however, if Georgia has not instituted her action at common law, it will be dissolved" (2 U.S. 415, 418).

One year later (the February, 1794 Court term) the matter was again before the Court. At this time the “cause was now tried, by a special jury, upon an amicable issue” to determine the rightful ownership of the debt (between Brailford and Georgia) due from Spalding as well as “the right of action to recover it” (3 U.S. 1). Nothing in the Court record indicated a switch from an equity lawsuit to a common law action requiring a jury trial, yet that was what occurred. After four days of hearing argument, the jury was charged to deliberate upon a verdict by Chief Justice Jay. After deliberating for “some time,” the jury returned to the bar “and proposed the following questions to the court” (3 U.S. 1, 4):

1. Did the act of the State of Georgia completely vest the debts of Brailsford, Powell & Hopton, in the state, at the time of passing the same?
2. If so, did the treaty of peace, or any other matter, revive the right of the defendants to the debt in controversy? (3 U.S. 1, 5)

Chief Justice Jay replied that the Court was unanimous in its opinion that the Georgia sequestration law “did not vest the debts of Brailsford, Powell & Hopton, in the state at the time of passing it” (3 U.S. 1, 5). Regarding the second question, the Chief Justice began by explaining that “no sequestration divests the property in the thing sequestered” and that, accordingly, Brailsford et al were “the real owner[s] of the debt” (3 U.S. 1, 5). The Georgia law only served “to prevent Brailsford’s recovering the debt, while the war continued, but that the mere restoration of peace [by the law of nations], as well as the very terms of the treaty, revived the right of action to recover the debt” (3 U.S. 1, 5). Thus, by means of some legalistic maneuvering, the Court avoided addressing the direct conflict of state law with a congressionally approved treaty as well as dodged having to rule on which of the two, by virtue of constitutional superiority, should prevail. The Court’s affirmation of “all Treaties made” enjoying equal status with the “Constitution” and the “Laws of the United States” as the “supreme Law of the Land,”

at least according to Article VI of the Constitution, would have to wait for a subsequent legal conflict. From the more modern framework of adaptive work articulated by Dr. Heifetz, the decision in *Brailsford v. Georgia* could be viewed as “orchestrating the conflict” (Heifetz & Linsky, p. 102).

*Ware v. Hylton*, 3 U.S. (Dall.) 199 (1796), directly confronted the conflict between a state law and treaty provisions, thereby achieving status as the precedent for the supremacy of treaties over state laws and constitutions as stated in Article VI, ¶ 2 of the U.S. Constitution that reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; **and all Treaties made, or which shall be made**, under the Authority of the United States, **shall be the supreme Law of the Land**; and the Judges in every State shall be bound thereby, **any Thing in the Constitution or Laws of any State to the Contrary notwithstanding**.  
(Emphasis added)

*Ware v. Hylton* also served as a typical example “of numerous cases brought by British creditors to recover pre-Revolutionary War debts owed them by Americans” (Hall, 1992, p. 910).

Emanating from Virginia, the case marked the only time that future Chief Justice John Marshall argued a case before the Supreme Court, an argument that he lost as he represented Daniel Hylton and Francis Eppes, the defendants (3 U.S. 199, 210; Hall, 1992, p. 523).

The pertinent facts of the case follow. Hylton and Eppes contracted a debt of slightly more than £ 2,796 sterling with the firm of Farrel & Jones on July 7, 1774, approximately two years before Virginia and her sister colonies declared their independence from Great Britain. Beginning May 6th and continuing through July 5, 1776, elected representatives “of the several counties and corporations of Virginia” met “in general convention, for the purpose of framing a new government” (3 U.S. 199, 223). Prior to the U.S. Declaration of Independence, “the convention of Virginia formally declared, that Virginia was a free, sovereign and independent

state” in June, 1776 (3 U.S. 199, 224). On July 4, 1776, “the United States, in congress assembled, declared the thirteen united colonies free and independent states” (3 U.S. 199, 224). Following the Declaration of Independence, Hylton and Eppes elected to become “citizens of Virginia,” while both Jones and Farrel chose to remain British subjects “paying allegiance to the king of Great Britain” (3 U.S. 199).

On October 20, 1777, the Virginia legislature enacted a statute “to sequester British property” (3 U.S. 199, 220). The Virginia law also contained provisions “enabling its citizens to pay debts owed to British subjects into the state treasury in depreciated currency and thereby obtain a certificate of discharge” (Hall, 1992, p. 910). Pursuant to the Virginia legislation, Hylton and Eppes “paid into the loan-office of Virginia, part of their debt, to wit, \$3,111 1/9, equal to 933*l.* 14*s.* 0*d.* Virginia currency; and obtained a certificate from the commissioners of the loan-office” on April 26, 1780 (3 U.S. 199, 220). While approved by Congress on November 15, 1777, and ratified by ten of the thirteen states in 1778, the Articles of Confederation were not officially ratified and adopted as the official operating document of the “confederation of the United States” until March 1, 1781 (3 U.S. 199, 222).<sup>185</sup>

On September 3, 1783, a treaty of peace was finalized in Paris between the United States and Great Britain. The fourth article of the treaty stated, “It is agreed, that creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bonâ fide* debts, heretofore contracted” (Emphasis in original) (3 U.S. 199, 239). The fifth article of the peace treaty read, “That all persons who have any interest in confiscated lands, by debts, should meet with no lawful impediment in the prosecution of their just rights” (3 U.S. 199, 238-239).

In 1790 William Jones, the surviving partner of Farrel & Jones, filed suit in the U.S. Circuit Court for the District of Virginia to recover the debt originally contracted by Daniel Hylton and Francis Eppes, who were named as defendants in the lawsuit (Gibbons, p. 1940; 3 U.S. 199). At some unknown point in the litigation, Jones died; subsequently the administrator of his estate, a Mr. Ware (whose first name was not recorded) “was duly substituted as plaintiff in the cause” (3 U.S. 199). In 1793 the circuit court, with Justice Iredell serving as one of the judges, found for the defendants, Hylton and Eppes, whereupon Ware successfully applied for a writ of error to the U.S. Supreme Court.<sup>186</sup>

Appearing before the Court, attorneys Marshall and Campbell presented five arguments on behalf of the American defendants, Hylton and Eppes. First, they argued that the debt had already been paid. Marshall declared, “There cannot be a creditor, where there is not a debt” (3 U.S. 199, 213).

Second, defense attorneys pointed out that Jones and Farrel became enemies of Virginia because they chose to remain loyal to the British crown. As enemies of Virginia, their property, including loans, had been confiscated by Virginia when the legislature passed the sequestration act on October 20, 1777. Furthermore, Hylton and Eppes had made payment to “the state of Virginia” on April 26, 1780, in accordance with the requirements of the Virginia law (3 U.S. 199, 200). As a result, no debt remained that could be an issue in any legal proceedings. Particularly referencing the treaty provisions, defense attorneys concluded:

British debts were extinguished by the act of confiscation. The [treaty] article, therefore, must be construed with reference to those creditors, who had *bonâ fide* debts subsisting, in legal force, at the time of making the treaty; and the word *recovery* can have no effect to create a debt, where none previously existed. (Emphasis in original) (3 U.S. 199, 213)



Third, Marshall and Campbell pointed again to the British citizenship of Jones and Farrel, noted their status as “enemies of, and at open war with, the state of Virginia, and the United States of America,” and cited two subsequent actions by the Virginia legislature, the first of which confiscated all British property on behalf of the “commonwealth,” the second of which prohibited any “subject of Great Britain” from recovering any confiscated property “in any court in this commonwealth” (3 U.S. 199, 201).

Fourth, Marshall and Campbell pointed out “that his Britannic majesty hath willfully broken and violated” the peace treaty of 1783 between the United States and Great Britain, on account of which “the plaintiff ought not to maintain an action” (3 U.S. 199, 202). Violations included the carrying off “the negroes in his possession, the property of the American inhabitants of the United States,” the refusal “to withdraw his armies and garrisons from every port and harbor,” the retention “of the forts Detroit and Niagara, and a large territory adjoining the said forts ... within the bounds and limits of the United States of America,” and finally, supplying and furnishing “certain nations or tribes of Indians” with “arms, ammunition and weapons of war ... for the purpose of enabling them to prosecute the war against the citizens of these United States” (3 U.S. 199, 202-203).

Fifth, Marshall and Campbell noted that the original debt was contracted under the colonial government, a government that no longer existed since on July 4, 1776, “the people of North America ... dissolved the until then subsisting government,” an action “whereby the right of the plaintiff to the debt ... was totally annulled” (3 U.S. 199, 203).

Attorneys Tilghman and Wilcocks presented arguments for the plaintiff Ware, administrator for the estate of William Jones, “the surviving partner of Farrel & Jones, subjects of the king of Great Britain” (3 U.S. 199). To the first defense argument, Tilghman and

Wilcocks responded, “Non solverunt,” a plea emanating from the Latin form of the verb, “*solvere*, to loosen, release, dissolve” (Random House Webster’s College Dictionary, p. 1230). Thus, the defense argument didn’t serve to loosen or release defendants from their legal responsibility regarding payment of the contracted debt.

In response to the defense argument regarding the Virginia sequestration law and subsequent action under that act by the defendants Hylton and Eppes, plaintiff attorneys Tilghman and Wilcocks, declaring that defense arguments were “not sufficient in law to bar the said plaintiff from ... maintaining his said action,” directed attention to the 1783 “treaty of peace between the United States of America and his Britannic majesty” (3 U.S. 199, 203). Tilghman and Wilcocks first noted the treaty clause stipulating “that the creditors of either side should meet with no lawful impediment to the recovery of the full value in sterling money, of all *bonâ fide* debts theretofore contracted” (Emphasis in original) (3 U.S. 199, 204). Pointing out that the debt occurred before treaty was negotiated and thereby fell under the treaty provisions, plaintiff attorneys Tilghman and Wilcocks directed attention to the U.S. Constitution which:

expressly declared, that treaties which were then made, or should thereafter be made, under the authority of the United States, should be the supreme law of the land, anything in the said constitution, or of the laws of any state, to the contrary notwithstanding. (3 U.S. 199, 204)

Regarding the remainder of defense arguments, Dallas noted, “To the 3d [sic], 4th and 5th pleas in bar, the plaintiff demurred generally” (3 U.S. 199, 205).

Only four of the six justices participated in the case: Chase, Cushing, Patterson, and Wilson. Ellsworth did not participate, and Iredell recused himself because he had served on the circuit court that ruled in favor of the defendants, Hylton and Eppes. Although he didn’t participate, Iredell later submitted an opinion that was included in the Dallas Reports (3 U.S. 256, n. a).<sup>187</sup> Finding 4-0 for the plaintiff, Ware, the Court delivered seriatim opinions that

“revoked and annulled” the judgment of the circuit court (3 U.S. 199, 284). The opinion by Justice Chase was the most comprehensive in its scope, treating both international and national law as it bore on the subject matter. Also of interest, Chase’s opinion clarified the international legal status of the states under the Articles of Confederation. The states possessed a quite different legal status under the Articles than they did under the Constitution. According to Justice Chase:

From the 4th of July 1776, the American states were *de facto*, as well as *de jure*, in the possession and actual exercise of all the rights of independent governments.... [A]ll laws made by the legislatures of the several states, after the declaration of independence, were the laws of sovereign and independent governments. (Emphasis in original) (3 U.S. 199, 224-225)

And later, discussing Virginia’s sequestration law after comprehensively reviewing statements by Vattel, Grotius, and others regarding the law of nations (as well as leading British authorities and legal rulings bearing on the issue) , Chase declared, “I conclude, that Virginia had a right, *as a sovereign and independent nation*, to confiscate any British property within its territory...” (Emphasis added) (3 U.S. 199, 231).

The opinion by Justice Chase was also the most direct of the Court’s seriatim opinions in confronting the conflict between state laws and ratified treaties. For example, Chase was the only justice to explicitly frame the legal question involved. As presented by Justice Chase:

The question then may be stated thus: whether the 4th article of the said treaty nullifies the law of Virginia, passed on the 20th of October 1777; destroys the payment made under it; and revives the debt, and gives a right of recovery thereof, against the original debtor? (3 U.S. 199 235)

After quoting Article VI of the Constitution, Justice Chase observed, “It is the declared will of the people of the United States that every treaty made by the authority of the United States, shall be superior to the constitution and laws of any individual state” (3 U.S. 199, 237). From that

observation, Chase drew four conclusions of law about the supremacy of treaties over state constitutions and laws:

1st. That it is retrospective, and is to be considered in the same light as if the constitution had been established before the making of the treaty of 1783.  
 2d. That the constitution or laws of any of the states, so far as either of them shall be found contrary to that treaty, are, by force of the said article, *prostrated before the treaty*. 3d. That, consequently, the treaty of 1783 has superior power to the legislature of any state, because no legislature of any state has any kind of power over the constitution, which was its creator. 4th. That it is the declared duty of the state judges to determine any constitution or laws of any state, contrary to that treaty (or any other), made under the authority of the United States, null and void. (Emphasis added) (3 U.S. 199, 237)

Thus, the question that the Court had avoided confronting in *Georgia v. Brailsford* was squarely faced in *Ware v. Hylton*.

## Endnotes

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- <sup>1</sup> I am indebted to Dr. Jim Davis, Director of the Iowa Writing Project for this insight. Jim vocalized this insight at countless meetings and IWP workshops throughout Iowa over the past twenty years. See Davis, 1996. Jim's insight was statistically verified by the work of two professors in England, Paul Black and Dylan Wiliam. See Endnote #4 below as well for Black & Wiliam, 1998.
  - <sup>2</sup> No research exists to support a positive correlation between the adoption of standards and an increase in student achievement. Research does support positive correlations between: a) teacher knowledge/expertise and increased student learning; and b) increased student learning and professional development focused upon increasing the teacher's instructional expertise. One researcher discovered that teacher expertise accounted for approximately 40% of variance in student achievement gains in reading and mathematics which was far more than any other factor accounted for (See Ferguson, 1991). Researchers at the University of Chicago reported that teacher expertise, teacher experience, and teacher levels of education were the three variables most associated with significant increases in student achievement (See Hedges, Laine, & Greenwald, 1994 and Greenwald, Hedges, & Laine, 1996). The executive director of the National Commission on Teaching and America's Future examined research and reported that "teacher knowledge of subject matter, student learning and development, and teaching methods" were critical elements of teacher effectiveness (See Darling-Hammond, 1998).
  - <sup>3</sup> In addition to my twenty-four years spent in Iowa as a public school teacher and administrator (1980-2004), this assertion also rests upon the following multiple sources: Iowa Department of Education, 2000, pp. 2-3; Iowa Writing Project, 1999, pp. 3-5; School Administrators of Iowa, 2002, pp. 1, 5; Stilwill, 2003, May 1, p. 1; Stilwill, 2003, May 14, pp. 6, 8, 10, 12.
  - <sup>4</sup> Black and Wiliam conducted a metanalysis of research about assessment. One of their questions asked, "Does better classroom assessment improve student achievement?" Black & Wiliam discovered that the effect sizes for classroom assessment were larger than those normally found in educational research, ranging from +0.4 to 0.7 standard deviations. To put those numbers into perspective, an effect size of +.04 would equalize achievement between an average student in the pilot study and the top students in the control group. An effect size of +.07 would have raised England's mathematics achievement ranking in TIMSS from 21st to 5th. Black & Wiliam found that the greatest boosts occurred for low achievers which decreased the range of differences in student achievement in classrooms. They concluded that as teachers use classroom assessment to know about student difficulties with learning and to learn how students are progressing with their learning, teachers will be able to more effectively adapt their teaching to meet student learning needs. This supports the belief that the best educational decisions are those made in closest proximity to the learner.
  - <sup>5</sup> See Bogdan & Biklen, 2003; Creswell, 1998; and Gall, Gall, & Borg, 2003.
  - <sup>6</sup> See Elias & Levinkind, 1999, pp. 6/3-6/4; Roberts & Schlueter, 2000, pp. 29-36; and Yelin & Samborn, 2003, pp. 20-26.

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- <sup>7</sup> At the time he was interviewed on May 14, 2003, Mr. Stilwill served as both the Iowa Director of Education and as the President of the National Council of Chief School Officers. Mr. Stilwill retired as the Iowa educational leader in August, 2004.
- <sup>8</sup> See Christensen, 2003; Stilwill, 2003, May 14; and Janson, 2003.
- <sup>9</sup> This format was developed using my previous experience with legal research combined with my reading of Deaver, 1992, pp. 69, 72-73, 93; Gottesmann & Gottesmann, 1998, pp. 22-23, 63-65; Miller, 2004; and Nunneke, 2001, pp. 47-53.
- <sup>10</sup> All quotations from Director Stilwill's unpublished interview come from the May 14th citation. For ease and simplification, Stilwill's remarks will simply be cited as "Stilwill, 2003" followed by the page of the interview transcript.
- <sup>11</sup> Sources for the individual items follow: "allowable growth," [http://www.myiowaschools.org/funding\\_tools/recent\\_cuts\\_to\\_education.pdf](http://www.myiowaschools.org/funding_tools/recent_cuts_to_education.pdf); "negotiated settlements" and "health insurance cost increases," <http://www.ia-sb.org/HumanResources/TAs/tentativeagreements.asp>; "districts on budget guarantee," M. Buckton (Government Relations Director, Iowa Association of School Boards), personal communication, November 29, 2004. All electronic resources were retrieved 11-29-04.
- <sup>12</sup> See Dobbs, 2004; Feller, 2004; and Editorial, 2004. According to *The Washington Post*, Sandy Kress, an attorney from Austin, TX, assisted Spellings in authoring NCLB. Spelling's second husband is Robert Spellings, an Austin attorney who lobbied on behalf of vouchers.
- <sup>13</sup> Christensen stated that the Nebraska Senators and Representatives reported to him that they were unable to find out the content of what they were voting on because it was written behind a closed door and was still being revised as the voting was taking place. Stilwill also confirmed this in his interview and observed that Iowa's congressional delegation voted on a piece of legislation that they didn't fully understand. Stilwell related that the Iowa legislators told him that they didn't realize it would have an impact on Iowa, given Iowa's leading position on education. Neither Christensen nor Stilwill were aware of any input by public school educators regarding the content of NCLB. To their knowledge, no public school educators and no state department of education personnel from either Nebraska or Iowa were involved in the writing of the federal education bill.
- <sup>14</sup> See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 570-572 (1985) (Powell, J., dissenting); *FERC v. Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting in part); Amar, pp.1425, 1500-03; Merritt, pp. 4-7.
- <sup>15</sup> See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 575-577 & n. 18 (1985) (Powell, J., dissenting); *FERC v. Mississippi*, 456 u.s. 742, 789-790 (1982) (O'Connor, J., dissenting in part); Merritt, pp. 7-8; Beer, pp. 9-10; Kaden, pp. 855-857.
- <sup>16</sup> See Graglia, 1982, pp. 23, 25-26; Howard, 1985, p. 795; Kaden, 1979, p. 854; Merritt, 1988, pp. 8-9; Olson, 1982, pp. 7, 12; Scheiber, 1978, pp. 619, 621.
- <sup>17</sup> Sources for the percentage of the Iowa state budget spent on education include the Iowa Association of School Boards (IASB, 2002) and Lisa Oakley, Iowa Department of Management, personal communication on February 1, 2005 (see Appendix G).

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- <sup>18</sup> Sources for Iowa being the most literate state in the U.S. include Radio Iowa (Kelley, 2004) and Time Magazine (The State University of Iowa, 1954, p. 63). The Time article stated, “For one thing, Iowa itself is the most literate state in the union (*i.e.*, has the lowest percentage – 3.9% - of illiterates) ...” It is difficult to obtain recent data regarding state comparisons of adult literacy. While the National Adult Literacy Survey was administered in 1992 and the International Adult Literacy Survey was given during 1994-98, no data emerged in terms of state comparisons. Data was disaggregated in a number of ways (gender, level of education, geographic region, country, ethnicity/race, age, etc.), but not by state [see Kirsch, I.S., Jungeblut, A., Jenkins, L. & Kolstad, A. (1993) and OECD & Statistics Canada (2000)]. According to John Hartwig at the Iowa Department of Education who coordinated Iowa’s participation in both the national and international literacy surveys, ETS (Educational Testing Service) didn’t want to get into the politics of state comparisons. ETS was responsible for the national literacy survey (NALS) and collaborated with Statistics Canada for the design and implementation of the international survey (IALS). Hartwig stated that his own analysis of the national survey data put Iowa in the “top 5% of the states in terms of adult literacy,” but that the survey data as compiled by ETS could support no clear ranking beyond that (Hartwig, personal communication, January 31, 2005). In NALS the Midwest region had the highest average proficiencies on prose literacy, document literacy, and quantitative literacy of all the regions (Northeast, Midwest, South, West) (p. 47). The Iowa adult literacy results indicated that Iowa’s average proficiencies on prose, document, and quantitative literacy all exceeded the Midwest averages in those categories (Jenkins & Kirsch, 1994, Figure 1). These figures would support the notion of high adult literacy in Iowa compared to the rest of the nation.
- <sup>19</sup> There are two main sources for Iowa City having the country’s highest educated population: an article in *Utne Reader* entitled “The 10 Most Enlightened Towns in America” (Walljasper, 1997) that was also reported in the *Cedar Rapids Gazette* (Muller, 1997); and a data set from the 2000 U.S. Census (Appendix H) provided by Beth Henning, Census Specialist at the State Library of Iowa.
- <sup>20</sup> See *FERC v. Mississippi*, 456 U.S. 742, 788-789 (1982) (O’Connor, J., dissenting in part); *Chandler v. Florida*, 449 U.S. 560, 578-580 (1981); *Roth v. United States*, 354 U.S. 476, 505-506 (1957) (Harlan, J. dissenting).
- <sup>21</sup> See the following books of the Bible (King James Version): Numbers 14: 6-7; Deuteronomy 1: 28-30; Joshua 23: 6-10; 1 Samuel 17: 26, 33-37, 45-47; 2 Samuel 10: 11-12; 1 Chronicles 19: 12-13; 1 Chronicles 28: 20; Job 38: 3; Job 40:7.
- <sup>22</sup> See Brogan, pp. 288-323; *Dred Scott v. Sanford*, 60 U.S. 393 (1857); and Woodward, pp. 11-29.
- <sup>23</sup> Political analyst and historian Garry Wills highlighted the role of the Three-fifths Clause of the Constitution as a critical factor in Southern dominance of the federal government. Early on, northern legislators understood the key role that the Three-fifths Clause would play in sectional politics. From an early senatorial appeal to New Hampshire constituents, Wills quoted Senator William Plumer’s explanation of the Clause’s implications (“Impartialis” [William Plumer], *An Address to the Electors of New Hampshire*, 1804, cited in Lynn W.

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Turner, *William Plumer of New Hampshire, 1759-1850* [University of North Carolina Press, 1962], p. 146):

Every five of the Negro slaves are accounted equal to three of you ... Those slaves have no voice in the elections; they are mere property; yet a planter possessing a hundred of them may be considered as having sixty votes, while one of you who has equal or greater property is confined to a single vote. (Wills, 2003, p. 3)

Referencing Andrew Jackson's victory over John Q. Adams, Wills noted figures developed by another historian (Leonard L. Richards, *The Life and Times of Congressman John Quincy Adams* [Oxford University Press, 1986], p. 15):

Thanks to the mechanics of the electoral college and the three-fifths rule, Jackson's 200,000 southern supporters provided him with far more help, man for man, than some 400,000 northerners [for Adams]: 105 electoral votes as compared with 73. (Wills, 2003, pp. 202-203)

Wills provided more information about the extra representation granted southerners courtesy their slaves when discussing Adams efforts in the House of Representatives to defeat a gag rule that would prohibit any petitions discussing the abolition of slavery from being presented to Congress. Citing a different historian (William Lee Miller, *Arguing about Slavery: John Quincy Adams and the Great Battle in the United States Congress* [Viking Press, 1998], pp. 306-307), Wills quoted:

Adams would have won except for his parallel hate, the three-fifths clause. In a House apportioned on the one-white-man, one-vote basis, southerners would not have had the 19 representatives received for black non-citizens in 1840. The slave power needed most of those 19 boosts in power to pass the latest gag rule by six votes. (Wills, 2003, p. 220)

Discussing the Kansas-Nebraska Act of 1854 and its passage by a mere thirteen votes, Wills quoted from yet a third historian to provide further illumination into the operation of the Three-fifths Clause of the Constitution (William W. Freehling, *The Road to Disunion, Vol. 1, Secessionists at Bay, 1777-1854* [Oxford University Press, 1990], p. 559):

The slave power's extra representatives aided Northern Democrats in securing the minority's legislation. Because every five slaves counted as three votes in apportioning House representatives, southerners received 19 more seats than a one-white-man, one-vote egalitarian republic would have provided. The slave power needed a third of those extra votes to pass Kansas-Nebraska. Anti-Nebraska forces had yet another reason to denounce the rape of republicanism. (Wills, 2003, p. 225)



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Finally, free laborers and farmers in Northern states did not begin to view slavery as an economic threat to their well-being until after the Mexican War (Brogan, pp. 306-323).

<sup>24</sup> Dorr then filed for a writ of habeas corpus, but in *Ex parte Dorr*, the U.S. Supreme Court refused to hear the plea “because the federal writ [of habeas corpus] did not reach state constitutions” (Hall, 1992, p. 516).

<sup>25</sup> The office of solicitor general was set forth by Congress in 1870 “when Congress created the Department of Justice” (Hall, 1992, p. 803). Congressional intent was to provide assistance for the attorney general by creating a position that would represent “the United States wherever the government had an interest in litigation” (Hall, 1992, p. 803). Besides serving in the Justice Department, the solicitor general “also has chambers in the Supreme Court” (Hall, 1992, p. 803).

Out of all the federal government’s officials, only the solicitor general is required by law to be “learned in the law” (Hall, 1992, 803). The solicitor general “is the chief courtroom lawyer for the executive branch” and “is the only amicus curiae regularly given time to argue” (Hall, 1992, p. 803). When arguing cases before the Court, the solicitor general dresses “in formal swallowtail, striped trousers, and pearl gray vest, an age-old tradition for attorneys representing the United States,” because such “attire was meant to symbolize ‘the dignity of the United States in arguments before the Supreme Court’” (Gormley, p. 149).

All petitions for a writ of certiorari submitted to the Court from federal agencies must first pass through the office of the solicitor general who typically forwards only one out of six submitted as the “justices rely heavily on the solicitor general to help choose and present the most pressing cases for review” (Hall, 1992, p. 803). While the Court grants certiorari to “only 3 percent submitted by other lawyers across the country,” the Court grants about “80 percent of the certiorari petitions submitted by the solicitor general” (Hall, 1992, p. 803). The Court also relies on the solicitor general “for help on legal problems that appear especially vexing” by inviting “him to submit briefs in cases where the executive branch is not a party” (Hall, 1992, p. 803). In these latter instances the Court’s “justices expect him to look beyond the government’s narrow interests, to take a long view about the development of legal doctrine” (Hall, 1992, p. 803). In these ways the solicitor general serves as the “conscience of the government” (Gormley, p. 143).

<sup>26</sup> After the *Sipuel* case, Houston’s primary role changed from arguing cases himself to that of coordinating attorney representation and serving in an advisory capacity. On August 27, 1949, fatigued by a heart condition, Houston wrote to Robert L. Carter, First Assistant Special Counsel for the NAACP, about the change. Houston wrote, “These education cases are now tight sufficiently so that anyone familiar with the course of the decisions should be able to guide the cases through. You and Thurgood can proceed without any fear of crossing any plans I might have” (McNeil, p. 200). The letter was written slightly more than a month before Houston was hospitalized and diagnosed for “acute myocardial infarction” in October, 1949 (McNeil, p. 193). Houston had approximately eight more months to live before he would die of a heart attack on April 22, 1950 (McNeil, p. 211).

<sup>27</sup> To illustrate the original literary rendering of a dilemma from which there is no escape, the dilemma given the name of the novel in which it appeared, the following selection is presented:

Yossarian looked at him soberly and tried another approach. "Is Orr crazy?"

"He sure is," Doc Daneeka said.

"Can you ground him?"

"I sure can. But first he has to ask me to. That's part of the rule."

"Then why doesn't he ask you to?"

"Because he's crazy," Doc Daneeka said. "He has to be crazy to keep flying combat missions after all the close calls he's had. Sure, I can ground Orr. But first he has to ask me to."

"That's all he has to do to be grounded?"

"That's all. Let him ask me."

"And then you can ground him?" Yossarian asked.

"No. Then I can't ground him."

"You mean there's a catch?"

"Sure there's a catch," Doc Daneeka replied. "Catch-22. Anyone who wants to get out of combat duty isn't really crazy."

There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. (Heller, p. 52)

<sup>28</sup> The following is based on Clinton Rossiter's edition of *The Federalist Papers* which is listed in the references. John Jay wrote five of the articles (numbers 2-5 & 64). James Madison authored twenty-six of the articles (numbers 10, 14, 37-58, & 62-63). Alexander Hamilton wrote fifty-one of the articles (numbers 1, 6-9, 11-13, 15-17, 21-36, 59-61, & 65-85). Hamilton and Madison co-authored three articles (numbers 18-20).

<sup>29</sup> Cited from Jacques Necker, *A Treatise on the Administration of the Finances of France* (Translated by Thomas Mortimer, 3 vols., London, 1785), p. xxx.

<sup>30</sup> See the following: Brogan, pp. 264-265; Elkins & McKittrick, pp. 112 & 115-119; and McDonald, pp. 146, 163-166, 177, & 189.

<sup>31</sup> See Benton, I: 282, 303; Elkins & McKittrick, p. 51; Ketcham, pp. 288-289; McDonald, p. 130.

<sup>32</sup> See Federalist No. 44, pp. 251-253; Banning, p. 329; McDonald, p. 201.

<sup>33</sup> Boudinot's comments in response to Madison's challenge of the bank bill's constitutionality occurred on Friday, February 4, 1791. Prior to reading excerpts from Federalist No. 44, Boudinot remarked that another congressman had brought forth incomplete remarks from that same document whose author was "alleged ... to be also the author of the present plan before the House" (Benton, I: 290).

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- <sup>34</sup> See Chief Justice Marshall's opinion in *McCullough v. Maryland*, 17 U.S. 159, 206 (1819); see also p. 360 of this paper.
- <sup>35</sup> For the Virginia Resolutions, see PJM, 17, pp. 188-190. For the Kentucky Resolutions, see Peterson, 449-456. For historical discussion, see the following: Brogan, pp. 269-270; Elkins & McKittrick, pp. 719-721; Ketcham, pp. 395-400; and Wills, 2002, pp. 48-49.
- <sup>36</sup> Ironically, Madison's behavior precipitated the events culminating in *Marbury v. Madison*, a case, which in most Americans' minds, officially established judicial review, a concept that Madison had rejected in authoring the Virginia Resolutions. *Marbury* proved to be ironic for Madison in another sense as well. The man later dubbed "The Father of the Constitution" was judged by the U.S. Supreme Court to have violated the law in this constitutional landmark case. William Marbury, a Federalist, had been appointed to be a justice of the peace in the last days of President John Adams administration. Marbury's appointment, signed by President Adams and stamped with the seal of the United States by the outgoing secretary of state, remained undelivered when the incoming secretary of state, James Madison, took office. Madison refused to deliver the commission whereupon Marbury filed suit. In its opinion, the Court ruled that Marbury had been legally appointed and that Madison's action in withholding Marbury's commission was "not warranted by law" and violated "a vested legal right" (5 U.S. 137, 162).
- <sup>37</sup> This is one of several cases from the early days of our country in which the written opinion of the case has not been located. Evidence for this case "includes a series of petitions introduced in the New Jersey legislature" that denounced the high court's ruling that invalidated the state law (Gerber, p. 15, n. 1).
- <sup>38</sup> This is another case in which the court's written decision has not been located. Evidence consists of resolutions condemning the court's decision that were passed by the Rhode Island legislature, newspaper accounts suggesting that most judges approved of the court's handling of the case, and a detailed account of the case by the attorney, James Varnum, who argued the case for the merchants challenging the constitutionality of the state law. See Varnum, J.M. (1787), *The Case, Trevett Against Weeden: On Information and Complaint for Refusing Paper Bills in Payment for Butcher's Meat, in Market, at Par with Specie*. See also, Gerber, pp. 9-10.
- <sup>39</sup> Even as a co-author of *The Federalist*, Madison was still promoting a variation on his original proposal (which was deliberately rejected by the Convention, see Appendix L) for a Council of Revision that would have an absolute veto on congressional action. In Number 51, Madison advocated remedying the "defect of an absolute negative" through an added executive-Senate role:

An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed.... May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department... (Federalist No. 51, p. 291)

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As one historian assessed Madison's position, "[His] plan would [have made] the Court far more intrusive in the passage of legislation than the existing Court has ever been or pretended to be" (Wills, 1981/2001, p. 155). Wills concluded:

It cannot be said that the Madison of *The Federalist* opposed judicial activism, though some have taken certain words out of context to maintain this. His own plan would have been the greatest nightmare possible for those who have twisted his words in that fashion. (Wills, 1981/2001, p. 155)

A constitutional historian likewise summarized Madison's position in the following manner:

The Madisonian scheme had profound implications for the development of judicial power. Madison convinced the delegates that because the people formed the sovereign base for all of the government, the branches of government could be separated on the basis of function. The new Constitution elevated the judiciary to a position of equality with the other branches, a status it had not previously enjoyed.... The Madisonian vision of constitutional democracy demanded an active judiciary capable of sustaining common national interests over the parochial wishes of the states, while preserving minority property rights from overzealous legislators through fundamental law. (Hall, 1985, pp. 5-6)

<sup>40</sup> Regarding *The Federalist*, it is interesting to note that Hamilton is the sole author of the primary articles focused upon the judiciary and the major author (by an overwhelming majority) in terms of discussing the concept of judicial review. Six articles of *The Federalist* contain the term "judiciary" in their title – Numbers 78 through 83. All were authored by Hamilton. Only one other article contains the term "judiciary" in the subheadings of the articles in the table of contents – Number 22 – which was also written by Hamilton. Given the criteria of having the term "judiciary" in either the main title or the subheadings, Madison wrote no articles focused upon the judiciary. The concept of judicial review was noted in six different index citations involving the following five articles of *The Federalist*: Numbers 16 (p. 85), 78 (pp. 433-440), 80 (p. 444), 81 (pp. 450-451), all written by Hamilton, and Number 44 (p. 254), written by Madison.

<sup>41</sup> Montesquieu's full thoughts on the subject, from which Hamilton selected only a phrase, were:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control;

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for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. (Montesquieu, 1748/2002, Book XI, § 6, pp. 151-152)

- <sup>42</sup> Madison had been elected as a delegate to the Virginia ratification convention on March 25, 1788. He arrived in Richmond on June 2nd to attend the convention, which had begun meeting that day, and immediately began leading the campaign for ratification. On June 20, as the convention debated the judiciary, “Pendleton, Randolph, and Marshall, all experts in legal matters, carried the main burden. Madison intervened only to explain the view taken of the judicial power at the Philadelphia convention” (Ketcham, p. 261). See also Ketcham, pp. 251, 253-259, 261-264.
- <sup>43</sup> Senators who were Convention delegates and voted in favor of the act included: John Blair, VA; Oliver Ellsworth, CT; William Johnson, CT; Robert Morris, PA; Richard Bassett, DE; William Few, GA; George Read, DE; and Caleb Strong, MA (Beard, pp. 19, 21, 44-45, 48, & 50; *Annals of Congress*, 1, p. 51). Two senators who were Convention delegates and voted against the Judiciary Act of 1789 were: Pierce Butler, SC; and John Langdon, NH (Beard, p. 54). What is not known are their reasons for voting against the act since neither had voiced opposition to judicial review during the Convention. Nor did they record their reasons for opposing the Judiciary Act. Butler and Langdon could have instead favored the federal court model put forth by Virginia Senator Richard Henry Lee by which the federal court system would have consisted of only “a few admiralty judges scattered among seaports, dealing with maritime matters, and a single appellate Supreme Court (Hall, 1992, p. 472). If so, their opposition to the Judiciary Act would have been based upon opposition to the proposed model, not upon dislike of judicial review. The reason for their opposition, however, remains in the realm of conjecture.
- <sup>44</sup> According to Madison, the Attorney General’s “coadjutor” succeeded only in raising “a fog around the subject, and ... inculcat[ing] a respect for the Court for preceding sanctions in a doubtful case” (Madison’s letter of March 6, 1796, to Jefferson; quoted in Warren, p. 149; see also *PJM*, 16, p. 247). As can be seen, Madison’s opinion was quite different from that of others who witnessed Hamilton’s appearance. Besides referencing Justice Iredell’s impression of Hamilton, Warren also quoted a newspaper account of Hamilton’s argument before the Court which reported “that Mr. Hamilton ‘by his eloquence, candour and law knowledge has drawn applause from many who had been in the habit of reviling him’” (Warren, p. 149, n. 1). Warren also recounted Justice Story’s impressions of Hamilton’s legal abilities that he gained from others’ accounts. According to Story, “I have heard Samuel Dexter, John Marshall, and Chancellor Livingston say that Hamilton’s reach of thought was so far beyond theirs that by his side they were schoolboys – rush tapers before the sun at noon day” (Warren, p. 149, n. 1). Warren also quoted another newspaper account of Hamilton’s appearance before the Court:

[T]he whole of his argument was clear, impressive and classical. The audience, which was very numerous and among whom were many foreigners of distinction and many of the Members of Congress, testified the effect produced by the talents of this great orator and statesman. (Warren, p. 148)

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- <sup>45</sup> It is somewhat ironic that Madison, as one of the joint authors of *The Federalist Papers*, used the concept of the state interposing itself to defeat congressional actions. That concept is one that he and others had found to be a fault of the Articles of Confederation. Furthermore, it was presented as a fault that the new Constitution corrected through judicial review in Federalist No. 16, authored by Hamilton.

If the interposition of the State legislatures be necessary to give effect to a measure of the Union, they have only NOT TO ACT, or TO ACT EVASIVELY, and the measure is defeated....

But if the execution of the laws of the national government should not require the intervention of the State legislatures, if they were to pass into immediate operation upon the citizens themselves, the particular governments could not interrupt their progress without an open and violent exertion of an unconstitutional power.... If the judges were not embarked in a conspiracy with the legislature, they would pronounce the resolutions of such a majority to be contrary to the supreme law of the land, unconstitutional, and void. (Federalist No. 16, pp. 84 & 85)

- <sup>46</sup> The practices complained of by Madison and noted by other constitutional delegates “were widespread ... under the views then obtaining of ‘legislative power,’” according to Professor Corwin (Corwin, 1925, p. 515). Corwin also noted that one didn’t have “far to seek” in order to get at “the explanation of such views” (Corwin, 1925, p. 515). Professor Corwin continued:

Coke’s fusion of what we should to-day distinguish as “legislative” and “judicial” powers in the case of the “High Court of Parliament” represented the teaching of the highest of all legal authorities before Blackstone appeared on the scene. What is equally important, the Cokian doctrine corresponded exactly to the contemporary necessities of many of the colonies in the earlier days of their existence. (Corwin, 1925, p. 515)

Coke, of course, was Sir Edward Coke, who “was best known to our ancestors as the commentator on Littleton’s *Tenures*” (Corwin, 1965, p. 41). Corwin continued by citing Thomas Jefferson’s homage to Coke.

“Coke’s Lyttleton [sic],” wrote Jefferson many years afterward with reference to the pre-Revolutionary period, “was the universal lawbook of students, and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British Constitution, or in what was called British liberties.” (Corwin, 1965, pp. 41-42)

Tracing Coke’s career in English law, Professor Corwin stated:

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Before he was a commentator on the law of England, however, Coke was successively law reporter, crown attorney, chief justice of the Common Pleas, chief justice of the King's Bench, and member of Parliament; and always he was Edward Coke, an outstanding, aggressive personality, with a fixed determination to make himself mightily felt in whatever place of authority he might occupy. (Corwin, 1965, p. 42)

Corwin observed of Coke:

While Coke as attorney general had shown himself conspicuously subservient to the royal interest, his clashes as judge with James I make a notable chapter in judicial history. His basic doctrine was "that the King hath no prerogative, but that which the law and the land follows," and that of this the judges and not the king were the authorized interpreters. (Corwin, 1965, pp. 42-43)

Being introduced to Coke and being aware of his influence with American politicians and lawyers still doesn't explain his fusion of legislative and judicial functions resulting in the abuses complained of by Madison. According to Corwin, Coke's writings "classified Parliament as primarily a *court*, albeit a court which may make new law as well as declare the old" (Emphasis in original) (Corwin, 1965, p. 55). As Corwin assessed Coke's writings, "Clearly, what we have here exemplified is not legislative sovereignty, but rather entire absence of the modern distinction between legislation and adjudication" (Corwin, 1965, p. 56). As a result, in the early days of our nation, state constitutions claimed to be operating on the basis of the separation of powers, but state legislatures actually operated as miniature parliaments that combined legislative and judicial functions.

However, not all states waited for the Constitutional Convention to remedy legislative violations of the state constitutions. John Adams and the Commonwealth of Massachusetts reformed the previous fusion of legislative and judicial functions in the Massachusetts Constitution of 1780 in which they spelled out how the concept of the separation of powers actually worked. Article XXX of the Massachusetts Constitution, which was approved on March 2, 1780, stated:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

This answer to the problem of state legislative tyranny embedded Montesquieu's doctrine of the Separation of Powers into a constitutional requirement for institutional practice in order to provide "a government of laws and not of men" as an answer to Aristotle's question posed more than 2,000 years previously (See n. # 67). An observer of the widespread practice of state legislatures to fuse both legislative and judicial functions criticized the American

constitutions as representing “an unreasonable imitation of the usages of England” (Corwin, 1925, p. 520). In response, John Adams wrote his *Defence of the Constitutions* that, as described by Corwin, “was much less a ‘defence’ than an exhortation to constitutional reform in other states along the lines which Massachusetts had already taken under Adams’s own guidance” (Corwin, 1925, p. 520). The *Defence of the Constitutions* impacted the delegates to the Constitutional Convention. According to Corwin, “Copies of the *Defence* reached the United States early in 1787, and were circulated among the members of the Philadelphia Convention, reviving and freshening belief in ‘political science’ and particularly in the teachings of Montesquieu” (Corwin, 1925, p. 520).

- <sup>47</sup> Madison’s principle biographers attempt to make much of the fact that Madison disapproved of the use of the term “nullification,” thus attempting to distance him somewhat from it and from being a state rights advocate; this is derived from two incidents (see Ketcham, p. 396; Wills, 2002, p. 49). First, Madison wrote Jefferson on December 29, 1798, asking him:

Have you ever considered thoroughly the distinction between the power of the *State*, & that of the *Legislature*, on questions relating to the federal pact. On the supposition that the former is clearly the ultimate judge of infractions, it does not follow that the latter is the legitimate organ especially as a Convention was the organ by which the Compact was made. This was a reason of great weight for using general expressions that would leave to other States a choice of all the modes possible of concurring in the substance, and would shield the Genl. Assembly agst. the charge of Usurpation in the very act of protesting agst the usurpations of Congress. (Emphasis Madison’s) (PJM, 17, pp. 191-192)

Second, Madison objected to attempts by John Taylor and Jefferson to insert the phrase “null, void, and of no effect” after the word “unconstitutional” in the Virginia Resolutions, and they were withdrawn (Ketcham, p. 397; see also Smith, p. 1071). According to Ketcham, Madison displayed an “astute understanding of constitutional pitfalls” which permitted the Virginia Resolutions to be more moderate and shun “the centrifugal tendencies of the more categorical resolves Jefferson had sent to Kentucky” (Ketcham, p. 397). Such attempts to split the two collaborators ignore at least two considerations. First, Madison wrote his letter to Jefferson well after the Kentucky Resolutions had passed and well after he had seen copies of Jefferson’s draft and the resolution as passed by the Kentucky legislature. According to data provided by Ketcham, Madison had a copy of the former several weeks before writing Jefferson his concern – no earlier than mid-October and no later than mid-November (Ketcham, p. 395). Second, although he didn’t like to openly refer to nullification, he did call for the states to “interpose” themselves between their citizens and an unconstitutional action by the federal government. Perhaps being obtuse instead of clearly stating a position makes one a better politician, but it does not make Madison any less a state rights person at the time, nor does it excuse the use made later of his arguments by southern nullifiers and secessionists. Third, he did defend the idea of the Constitution as being a compact among the states (Ketcham, p. 396) and not springing from the people (although he had been instrumental in ensuring that popularly elected conventions, not state legislatures, acted to



ratify the Constitution). Fourth, the other states in the Union made no such distinction at the time between the two sets of resolutions, liking neither one.

- <sup>48</sup> These states, categorized according to the type of resistance offered by their state legislatures, are provided below, alphabetized within each category (See Woodward, pp. 156-157):

<u>Nullification</u>	<u>Interposition</u>	<u>Condemnation/Protest</u>
Alabama	Louisiana	North Carolina
Georgia	Virginia	South Carolina
Mississippi		

- <sup>49</sup> See Hall, 1985, p. 3. His investigation of judicial review resulted in a determination that the Constitutional Framers:

created a constitution that was meant to be a charter for government for government rather than a legalistic code of government operations. They expected each branch of the government to function in broad spheres of constitutional responsibility, and they anticipated that the justices would participate in establishing the boundaries of the new system. (Hall, 1985, p. 3)

- <sup>50</sup> See Alexander Hamilton's opinion regarding the constitutionality of the First Bank of the United States that he submitted to President Washington on February 23, 1791 (PAH, 8: 107). See the following pages of this paper: for the context of Hamilton's opinion, pp. 279-312; for Hamilton's remark, p. 312; for Chief Justice Marshall's use of Hamilton's remark in *McCullough v. Maryland*, p. 360; for a subsequent Court's paraphrase in *United States v. Darby* of Marshall's paraphrase in *McCullough v. Maryland* of Hamilton's legal opinion, p. 394; for the Court's use in *Atlanta Motel v. United States* of Darby's paraphrase of Chief Justice Marshall's paraphrase of Hamilton, p. 594.
- <sup>51</sup> In *Hoke v. United States* the Supreme Court upheld the constitutionality of an act of Congress that prohibited the transportation of women in interstate commerce for the purpose of prostitution. The popular name for the act was the "White Slave Traffic Act." See *Hammer v. Dagenhart*, 247 U.S. 251 at 270 (1918). Unfortunately this act was used against Jack Johnson, a Black heavyweight boxing champion, because white racists didn't like his consorting with white women.
- <sup>52</sup> The states included Arizona, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, and Wyoming (426 U.S. 833, 836). States actually submitting briefs for argument before the Court were the following states: Arizona (Bruce Babbitt, A.G.), California, Delaware, Indiana, Iowa (Richard Turner, A.G.), Maryland, Massachusetts, Mississippi, Missouri (John Danforth, A.G.), Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota (Bill Janklow, A.G.), Texas, Utah, and Wyoming; they were joined by the National Association of Counties, the

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National Institute of Municipal Law Officers, and the Public Service Research Council (426 U.S., at 834). States filing briefs of *amici curiae* urging the Court to rule against the 1974 FLSA amendments were New York and Virginia (426 U.S., at 835). States filing briefs of *amici curiae* urging the Court to uphold the Act's amendments included Alabama, Colorado, Michigan, and Minnesota; they were joined by the AFL-CIO, Coalition of American Public Employees, International Conference of Police Associations, and the Florida Police Benevolent Association (426 U.S., at 835).

- <sup>53</sup> Unlike previous Court opinions, this opinion did not separately present the legal arguments made by either the appellee or the appellant attorneys. That the Solicitor General cited precedents in his arguments to the Court on behalf of the federal government is inferred from two facts: first, the thrust of part of his arguments are summarized by the majority opinion; second, the nature of legal arguments requires case citations of holdings and dicta used to support attorney argumentation of a legal position.
- <sup>54</sup> Rehnquist was referring to “regulations proposed by appellee [the federal government]” which stated that “whether individuals are indeed ‘volunteers’ rather than ‘employees’ subject to the minimum wage provisions of the Act [were] questions to be decided by the courts’ (p. 850). Rehnquist then cited “Brief for Appellee 49, and n. 41,” which was of no use since the applicable material was not included in a footnote, which customarily happened in other case opinions (p. 850).
- <sup>55</sup> § 5 of the Fourteenth Amendment reads, “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article” (Farrand, IV, p. 99).
- <sup>56</sup> Interestingly, Justice Brennan’s dissent in *National League of Cities v. Usery* linked the two cases, *Hammer v. Dagenhart* and *Carter v. Carter Coal Co.* See 426 U.S. 833, 867-868.
- <sup>57</sup> Justice O’Connor joined the Court on September 25, 1981 (Hall, 1992, p. 987. Thus, *FERC* was argued during her first term on the bench, the October Term, 1981. Consequently, her dissent in *FERC* constituted one of her first Supreme Court opinions. As will be shown in the remainder of this note, O’Connor’s dissent was marked by the use of propaganda techniques, or as Justice Blackmun referred to them, “rhetorical devices” (p. 767, n. 30). It is simply too difficult to argue with Justice Blackmun’s assessments and characterizations of her dissenting opinion. Some (but not all) examples follow, placed in the order in which they appeared in Justice Blackmun’s majority opinion. First:

Justice O’Connor reviews the constitutional history at some length, ultimately deriving the proposition that the Framers intended to deny the Federal Government the authority to exercise “military or legislative power over state governments” ... If Justice O’Connor means this rhetorical assertion to be taken literally, it is demonstrably incorrect. (pp. 761-762, n. 25)

Next, Justice Blackmun observed, “It seems evident that Congress intended to defer to state prerogatives – and expertise – in declining to pre-empt the utilities field entirely” (p. 765, n. 29). After some further discussion of the issue, he remarked:

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Justice O'Connor's partial dissent's response to this is peculiar. On the one hand, she suggests that the States might prefer that Congress simply pre-empt the field, since that "would leave them free to exercise their power in other areas." Yet Justice O'Connor elsewhere acknowledges the importance of utilities regulation to the States ... and emphasizes that local experimentation and self-determination are essential aspects of the federal system.... Certainly, it is a curious type of federalism that encourages Congress to pre-empt a field entirely, when its preference is to let the States retain the primary regulatory role. (p. 765, n. 29)

Next, Justice Blackmun cited examples of name calling, reasoning from a false premise, exaggerated claims, etc., from Justice O'Connor's dissent. He then continued:

While these rhetorical devices make for absorbing reading, they unfortunately are substituted for useful constitutional analysis. For while Justice O'Connor articulates a view of state sovereignty that is almost mystical, she entirely fails to address our central point.

The partial dissent does not quarrel with the propositions that Congress may pre-empt the States in the regulation of private conduct, that Congress may condition the validity of State enactments in a pre-emptible area on their conformity with federal law, and that Congress may attempt to "coerce" the States into enacting nationally desirable legislation. Given this, the partial dissent fails to identify precisely what is "absurd" about a scheme that gives the States a choice.... [T]he partial dissent has pointed to no constitutionally significant theoretical distinction... (pp. 767-768, n. 30)

Finally, Justice Blackmun addressed some accusations made by O'Connor that were misrepresentative and untrue.

Justice O'Connor's partial dissent accuses us of undervaluing *National League of Cities*, and maintains that our analysis permits Congress to "dictate the agendas and meeting places of state legislatures." ...These apocalyptic observations, while striking, are overstated and *patently inaccurate*[emphasis mine]. We hold only that Congress may impose conditions on the State's regulation of private conduct in a pre-emptible area. (Emphasis added) (pp. 769-770, n. 32)

<sup>58</sup> See Chief Justice Marshall's opinion for the **unanimous Court** in *McCullough v. Maryland*, 17 U.S. 159, 198-199 (1819), which emphatically dismissed the states' rights view of the Constitution as a compact between the states. See also the following pages of this paper: for Hamilton's argument in *The Federalist* in favor of the people as the source of constitutional sovereignty, pp. 327-329; for Attorney Pinkney's arguments in *McCullough v. Maryland* in favor of the people as the source of constitutional sovereignty, p. 360; for the view of the

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Kentucky and Virginia Resolutions in favor of the states as the source of constitutional sovereignty, pp. 322, 342-343, 347; for the Court's *McCullough* ruling against the Constitution as a compact of the states, pp. 367-368.

- <sup>59</sup> In its opinion, the Court explained the difference between “registered” bonds and “bearer” bonds as flowing from “the mechanisms used for transferring ownership and making payments” (p. 508). According to the Court:

Ownership of a **registered bond** [emphasis mine] is recorded on a central list, and a transfer of record ownership requires entering the change on that list. The record owner automatically receives interest payments by check or electronic transfer of funds from the issuer's paying agent. (p. 508)

Bearer bonds, however, operate through a different process. As explained by the Court:

Ownership of a **bearer bond** [emphasis mine], in contrast, is presumed from possession and is transferred by physically handing over the bond. The bondowner obtains interest payments by presenting bond coupons to a bank that in turn presents the coupons to the issuer's paying agent. (p. 508)

- <sup>60</sup> For Justice Rehnquist's use of the quote in *National League of Cities v. Usery*, see 426 U.S. 833, 844 (1976). For Justice Brennan's disbelief at a quote being completely removed from its context by Rehnquist, see 426 U.S. 833, n. 8 at 867-868. See also the following pages of this paper: for the case summary of *Texas v. White* (1869) under the case law of the Guarantee Clause, pp. 124-126; for Rehnquist's use of the *Texas v. White* dicta in the *National League of Cities* majority opinion, p. 413; for Brennan's criticism of Rehnquist's use of the *Texas* dicta in Brennan's dissent from the *National League of Cities* ruling, p. 425; for subsequent use of the *Texas* dicta by Scalia in *Printz v. United States* (1997), p. 501; for an analysis of the multiple misuses of the dicta in *Texas v. White* by various justices as a propaganda technique, pp. 508-510.
- <sup>61</sup> The Hamilton quote is found on p. 76 of the 1999 C. Rossiter (Ed.) edition.
- <sup>62</sup> That Madison's Virginia Plan as presented by Randolph to the Convention meant to replace rather than amend the Articles while Patterson's New Jersey Plan aimed at keeping the Articles of Confederation except for the amendments he proposed can be demonstrated by several points. First, the wording of Resolution 1 in each proposal. Both contained the phrase “corrected and enlarged” in reference to the Articles of Confederation. The New Jersey Plan, however, added the word “revised” to immediately precede “corrected and enlarged” (Farrand, I, pp. 20, 242). Second, the only reference to the Articles of Confederation, by full name, in the Virginia Plan occurs in the first resolution. By contrast, Patterson's New Jersey Plan refers to the Articles of Confederation in Resolutions 1, 2, 3, and 6. Third, the content of each plan supports the contention that the Virginia Plan meant to replace the Articles while the New Jersey Plan sought only to amend the Articles. Finally, Patterson and Lansing's remarks in support of the New Jersey Plan at the Convention support

the contention. Speaking the day after the plan was presented, Lansing of New York noted the fault of the Virginia Plan, that in seeking to replace the Articles it exceeded the “power of the Convention” to “discuss & propose it” (Farrand, I, p. 249). Lansing noted the congressional authorization of the Convention as well as that of the several states in restraining “the power of the Convention ... to amendments of a federal nature” (Farrand, I, p. 249). Patterson expressed his preference for the New Jersey Plan “because it accorded ... with the powers of the Convention” (Farrand, I, p. 250). The next statement implicated what Patterson believed to be both the shortcoming of the Virginia Plan and the strength of the New Jersey Plan: “If the confederacy was radically wrong, let us return to our States, and obtain larger powers, not assume them of ourselves” (Farrand, I, p. 250).

<sup>63</sup> See the following: SAI Report, 2001, p. 1; School Administrators of Iowa, 2002, p. 1; Schemo, 2001, p. A32; Christensen, 2003, pp. 1-3, 21; Stilwill, 2003, p. 2; Rothstein, 2002, p. B10; Anderson, December 11, 2001.

<sup>64</sup> Article VIII of the Articles of Confederation read in part:

All charges of war, and all other expences [sic] that shall be incurred for the common defence [sic] or general welfare, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states ... according to such mode as the united states in congress assembled, shall from time to time direct and appoint. The taxes ... shall be laid and levied ... within the time agreed upon by the united states in congress assembled. (Rossiter, p. 354)

Article IX of the Articles read in part:

The united states in congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states. (Rossiter, p. 356)

Another paragraph of Article IX also read:

The united states in congress assembled shall have authority ... to ascertain the necessary sums of Money to be raised for the service of the united states, and to appropriate... - to agree upon the number of land forces, and to make requisitions from each state for its quota ... which requisition shall be binding, and thereupon the legislature of each state shall appoint... (Rossiter, pp. 356-357)

<sup>65</sup> For previous discussion in this paper regarding the multiple misuses of the *Texas v. White* quotation by various justices as a propaganda technique, see the following pages: for the actual context in which the original dicta was used in *Texas v. White*, pp. 118-119; for Rehnquist’s use in *National League of Cities v. Usery*, pp. 398-399; for Brennan’s reaction to Rehnquist’s misuse of the quote in his *National League of Cities* dissent, pp. 409-410; for

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O'Connor's use in *New York v. United States*, pp. 445-446; for Scalia's use in *Printz*, pp. 481, 488-490.

<sup>66</sup> The immediate context occurred in a play written by Hamlet, in which a character went to great lengths to state that if her husband died, she would never remarry. Given the vehemence of Scalia's response in the note, and given Scalia's response to one possible use of a propaganda technique by someone differing from him when he was guilty of multiple uses of the same technique (even to the point of repeating the same technique with the same quotation on two separate occasions), one could also be reminded of another line from Shakespeare's *Macbeth*: "[I]t is a tale Told by an idiot, full of sound and fury, Signifying nothing" (Act V, Scene v, Line 17).

<sup>67</sup> The Massachusetts Constitution of 1780 provides interest from another standpoint as well. It forms one of the links of an ancient chain identified by a professor of constitutional law, Edward S. Corwin. The chain consists of responses to a fundamental legal and political question, the answer to which constitutes the cornerstone of constitutional democratic forms of government. The question, first posed in written form by Aristotle in his *Politics*, asked, "Which is preferable in government, the rule of law or the rule of an individual?" Aristotle answered the question he posed by stating:

To invest the law then with authority is, it seems to invest God and reason only; to invest a man is to introduce a beast, as desire is something bestial, and even the best of men in authority are liable to be corrupted by passion. We may conclude then that the law is reason without passion and it is therefore preferable to any individual. (Corwin, 1965, p. 8)

John Adams embedded Aristotle's answer in the Massachusetts Constitution of 1780, combining it with Montesquieu's principle regarding the separation of governmental powers. Article XXX of the 1780 state constitution reads:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: *to the end it may be a government of laws and not of men.* (Emphasis added) (Massachusetts Constitution of 1780)

Chief Justice John Marshall next highlighted Aristotle's answer when a unanimous Supreme Court enunciated the principle of judicial review in 1803. As articulated by Marshall, the rule of law was preferred to that of individuals and even majorities. According to Marshall, the rule of law, when combined with a written constitution and the concept of limited government, provided justification for judicial review (Hall, 1992, p. 522). The Chief Justice, combining quotes from Blackstone with his own reasoning, opined:

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The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.... Blackstone states... “[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.” (*Marbury v. Madison*, 5 U.S. 137, 163)

Chief Justice Marshall continued with another quote from Blackstone serving to buttress his own reasoning:

“[F]or it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.”

*The government of the United States has been emphatically termed a government of laws, and not of men.* It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. (Emphasis added) (*Marbury v. Madison*, p. 163)

This idea was subsequently cited in another high court decision, *Yick Wo v. Hopkins* (1886), with the Court’s reference pointing to the Massachusetts Bill of Rights, perhaps unaware of the connection to Aristotle or of Professor Corwin’s identification of its lineage (See Appendix N for discussion of the same case). More recently, the First Circuit Court of Appeals referenced the same quotation from the Massachusetts Constitution in *Butler v. United States*, 78 F.2d 1, 8 (1935) in ruling that the Agricultural Adjustment Act of 1933 unconstitutionally delegated legislative authority to the President of the United States (See discussion of the case in Chapter Six of this paper).

<sup>68</sup> List deductively compiled by the writer from the list of states with “durational residency or citizenship requirements” supplied by District Court Judge Bownes (p. 1217, n. 14).

<sup>69</sup> In similar fashion, the Warren Court reached its decision in *Brown v. Board of Education* by jettisoning the case law undergirding “separate but equal” that was enshrined by *Plessy v. Ferguson*. See the following pages of this paper: for the *Plessy* Court’s creation of “separate but equal” legal doctrine, pp. 246-248; for Justice Harlan’s *Plessy* dissent opposing “separate but equal,” pp. 248-250, 803-804; for the Warren Court’s reasoning in overturning *Plessy*’s “separate but equal” doctrine in its *Brown* decision, pp. 252-253, 255-256, 809-811, 813-814.

<sup>70</sup> The term “Four Horsemen” was used during the 1930s by critics of the Court to refer to the four justices of the Supreme Court previously listed because of their anti-New Deal stance. “[T]he term evoked the legendary Four Horsemen of the Apocalypse” as described in *Revelation* 6: 2-8 (Hall, 1992, pp. 309, 584). Joined by Justice Owen Roberts, the four justices had:

overturned the Railway Pension Act in *Railroad Retirement Board v. Alton Railroad* (1935), voided the Agricultural Adjustment Act’s

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processing tax in *United States v. Butler* (1936), and struck down the New York State minimum wage law in *Morehead v. New York ex rel. Tipaldo* (1936) as commerce, tax, and due process clause violations. These decisions and *Schechter Poultry v. United States* (1935), which condemned the National Industrial Recovery Act, precipitated a constitutional crisis. (Hall, 1992, p. 895)

The Four Horsemen, joined by Roberts, had also invalidated the Bituminous Coal Conservation Act of 1935 “that established minimum wage requirements and collective bargaining” for the coal industry in *Carter v. Carter Coal Company* (1936) (See p. 426, this paper). The Four Horsemen’s attempts to invalidate the Social Security Act in *Steward Machine Co. v. Davis* (1937) and a minimum wage statute in *West Coast Hotel v. Parrish* (1937) were resisted by the same five justices who upheld the New Deal’s National Labor Relations Act in *NLRB v. Jones & Laughlin Steel Corporation* – Justices Louis Brandeis, Benjamin Cardozo, & Harlan Fiske Stone as joined by Chief Justice Charles Evan Hughes and Justice Owen Roberts (Hall, 1992, p. 895).

Van Devanter retired following the completion of the 1936 Court term and was replaced by Justice Hugo Black while Justice Sutherland resigned the following term and was replaced by Justice Stanley Reed (Hall, 1992, p. 986). Justice Butler, who “voted against the constitutionality of every New Deal measure that came before the Court in the 1930s,” died during the Court’s 1939 term and was replaced by Justice Frank Murphy (Hall, 1992, pp. 111, 986). McReynolds retired in 1941 and was replaced by Justice James Byrnes (Hall, 1992, pp. 542, 986).

<sup>71</sup> According to the Court, these took different forms. Seven states “still [had] dormant on their statute books laws passed in 1917-18, empowering the governor to require registration when a state of war exist[ed] or when public necessity require[d] such a step” (pp. 61-62, n. 8). These states included Iowa, Connecticut, Maine, New Hampshire, New York, Florida, and Louisiana. North Carolina and South Carolina “passed registration laws more recently” in similar fashion to Pennsylvania (pp. 61-62, n. 8). The Court also noted that the “[r]egistration statutes of Michigan and California were held unconstitutional” (pp. 61-62, n. 8).

<sup>72</sup> The Civil Rights Act of 1870, § 16 can be found in 16 Stat. 140, 144, 8 U.S.C. § 41 and reads:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

<sup>73</sup> The *Chinese Exclusion Case* is the secondary name for the case filed as *Chae Chan Ping v. United States* and was one of six cases resulting in four decisions that “refined congressional legislation designed to prevent Chinese immigration” during the 1880s and the 1890s (Hall,



1992, p. 143). While the singular designation referred to the particular case, *Chae Chan Ping v. United States*, the plural designation, “Chinese Exclusion Cases,” referred collectively to the following Supreme Court decisions: *Chew Heong v. United States*, 112 U.S. 536 (1884); *United States v. Jung Ah Lung*, 124 U.S. 621 (1888); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); and the following three cases combined into one decision, *Fong Yue Ting v. United States*, *Wong Quan v. United States*, and *Lee Joe v. United States*, 149 U.S. 698 (1893). The particular case, *Chae Chan Ping v. United States* a.k.a. *Chinese Exclusion Case*, upheld the constitutionality of the Scott Act’s “outright prohibition of reentry” by Chinese laborers who had left the country and desired to return (Hall, 1992, p. 143).

A constitutional scholar summarized the efforts of the Court in the four decisions known collectively as the Chinese Exclusion Cases: “After initially offering narrow holdings to protect Chinese reentry to the United States, the Supreme Court eventually succumbed to the anti-Chinese hysteria of the era and ratified far-reaching restrictions on basic rights for Chinese under American law” (Hall, 1992, p. 144).

- <sup>74</sup> The provisions of the 1875 Civil Rights Act declared unconstitutional by the 8-1 Court, Justice Harlan dissenting, “prohibited racial discrimination in inns, public conveyances, and places of public amusement” (Hall, 1992, p. 149).

The decision curtailed federal efforts to protect African-Americans from private discrimination and cast constitutional doubts on Congress’s ability to legislate in the area of Civil Rights, doubts that were not completely resolved until enactment of the Civil Rights Act of 1964. (Hall, 1992, p. 149)

The majority opinion interpreted the Fourteenth Amendment as prohibiting the state, as opposed to private individuals and businesses, from abridging individual rights. The Court majority viewed the 1875 Civil Rights Act as “an impermissible attempt by Congress to create a municipal code regulating the private conduct of individuals in the area of racial discrimination” (Hall, 1992, p. 149). One outcome of the decision was “the withdrawal of the federal government from civil rights enforcement,” a policy that would not be reversed until the 1950’s (Hall, 1992, p. 149).

- <sup>75</sup> 31 states had enacted public accommodation laws while the “Governor of Kentucky issued an executive order [in 1963] requiring all governmental agencies involved in the supervision or licensing of businesses to take all lawful action necessary to prevent racial discrimination” (p. 259, n. 8). Rather than list the states with either laws or executive orders regarding public accommodation as cited by the Court, it is simpler to list the states that DID NOT. In alphabetical order, they are:

Alabama	Louisiana	South Carolina
Arizona	Missouri	Tennessee
Arkansas	Mississippi	Texas
Florida	North Carolina	Utah
Georgia	Nevada	Virginia
Hawaii	Oklahoma	West Virginia

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- <sup>76</sup> In this paper, see the following: for the context of Hamilton's original remark made in his opinion regarding the constitutionality of the Bank Bill, pp. 279-312; for Hamilton's original remark, p. 312; for Chief Justice Marshall's paraphrase of Hamilton in *McCullough v. Maryland*, p. 360; for the Court's paraphrase in *United States v. Darby Lumber Company* of Marshall's use of Hamilton in *McCullough*, p. 394.
- <sup>77</sup> Within the framework of American government, power is distributed horizontally between the three branches of government and vertically between the state and federal governments. The latter, vertical division of power refers to federalism. Thus, most arguments against federal power translate into arguments on behalf of state governments and/or their political subdivisions, whether or not they actually mount a Tenth Amendment defense.
- <sup>78</sup> An Iowa native played a major role in the passage of the Bituminous Coal Act, also known as the Guffey-Snyder Act. John L. Lewis, a coal miner from Lucas, Iowa, represented the driving force behind the United Mine Workers. In concert with unionized northern coal mine operators, Lewis and the United Mine Workers threatened a national coal strike unless Congress made coal "a public utility subject to federal regulation" (Leuchtenburg, p. 161). The ensuing Guffey-Snyder Act "re-enacted the old bituminous coal code;" furthermore, it:

guaranteed collective bargaining, stipulated uniform scales of wages and hours, created a national commission which would fix prices and allocate and control production, authorized closing down marginal mines, and levied a production tax to pay for the mines and to rehabilitate displaced miners. (Leuchtenburg, p. 161)

- <sup>79</sup> Abe Fortas attended Yale Law School when Douglas taught there. Later, while teaching at Yale Law School, Fortas spent time commuting to Washington to work at the SEC during the time Douglas was there. "In 1939, Fortas joined the Department of Interior," where he was working when Sunshine Anthracite Coal Company's appeal was granted by the Supreme Court (Hall, 1992, p. 308). The nexus between the Interior Department and the coal company's appeal of the Bituminous Coal Commission's decision to deny the company's application for exemption as a producer of non-bituminous coal arose because the Commission's "functions ha[d] been administered since July 1, 1939, by the Bituminous Coal Division of the Department of the Interior" (p. 387, n. 2). After participating in arguments before the Court in this case, Fortas spent the remainder of WW II working in the Interior Department where he "supported land reform, opposed the imposition of martial law in Hawaii, and fought the internment of Japanese-Americans" (Hall, 1992, p. 308).

Following the war, Fortas "vigilantly protected civil liberties during the postwar Red Scare" by defending "Owen Lattimore and other victims of McCarthyism" (Hall, 1992, p. 308). Lattimore, of course, was one of "the 'Old China Hands' ... on [McCarthy's] original list of eighty-one 'cases' of Communist sympathizers in the State Department" who had "engineered the overthrow of our ally, the Nationalist Government of the Republic of China and aided in the Communist conquest of China" (Hilsman, p. 297; Hilsman, p. 296). Described as a "brilliant legal strategist," Fortas, in one of his pro bono cases, successfully

argued the landmark *Gideon v. Wainwright* (1963), a case that “established a right to counsel in all state felony cases” (Hall, 1992, p. 308). The case was chronicled in *Gideon’s Trumpet*, a book by Anthony Lewis that was popularized by being made into a movie of the same name starring Henry Fonda as Clarence Gideon, the convicted felon who had been too poor to hire legal counsel for his original trial. Taking advantage of the literalness of the name Gideon, Lewis derived the title from the Book of Judges in the Bible (ch. 6, v. 34), which stated, “But the Spirit of the Lord came upon Gideon, and he blew a trumpet ...” (Lewis, 1964, p. vii). Lewis, a two-time winner of the Pulitzer Prize and Supreme Court/Justice Department reporter for the *New York Times*, described Fortas as “a high-powered example of that high-powered species, the Washington lawyer” (Lewis, 1964, p. 48). However, “unlike most prominent lawyers Fortas ha[d] an interest in criminal law,” admired and looked up to Justice Brandeis, and “had deep social convictions,” having “fought for liberal causes throughout his life” (Lewis, 1964, pp. 51, 52).

Indirectly, Fortas had an Iowa connection in that he authored the Court’s opinion in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the case precipitated by high school students wearing black armbands at school in protest of the Vietnam War being waged by the United States. Later Fortas “resigned from the Court in disgrace” because of controversy surrounding money he had received while serving as a Justice of the Supreme Court (Hall, 1992, p. 309). A legal scholar summed up Fortas’ legal life by observing, “He did not have the time or temperament to become a great justice, but he was a great lawyer” (Hall, 1992, p. 309). President Nixon nominated Harry A. Blackmun, who was subsequently approved to take the seat left vacant by Fortas’ resignation from the Court (Hall, 1992, p. 987).

- <sup>80</sup> To examine how this question was argued and to see how it was played out by the major actors in President Washington’s first administrative cabinet and in the First Congress, see the following pages of this document: for Madison’s “strict construction” argument related to Constitution-as-detailed-plan as presented in his arguments to the House in opposition to Hamilton’s proposed Bank Bill, pp. 300-302; for Madison’s prior “broad construction” arguments related to Constitution-as-general-blueprint which he presented regarding interpretations of the Articles of Confederation, the President’s removal power of cabinet officials, the expansion of the census beyond the specifications of the Constitution, the crafting of the Tenth Amendment, and as discussed most completely in Federalist No. 44, pp. 302-307; for Jefferson’s “strict construction” argument as presented to President Washington opposing the constitutionality of Hamilton’s proposed Bank Bill, pp. 312-313; for the House’s debate of the Bank Bill connecting “broad interpretation” to Constitution-as-general-blueprint instead of Constitution-as-detailed-legal-code and for the debate in favor of a broad interpretation of the Constitution regarding implied powers, pp. 308-311; for Hamilton’s argument for “broad construction” of the Constitution-as-general-blueprint as presented in his opinion to President Washington regarding the constitutionality of the Bank Bill, pp. 314-320.

To see how this was argued and decided in *McCullough v. Maryland*, see the following pages of this document: for arguments by Wirt in favor of a broad construction of the Constitution-as-general-blueprint, pp. 354, 355-356; for similar arguments by Pinkney, pp. 354-355, 356-357; for arguments by opposing attorney Hopkinson in favor of a narrow construction of the

Constitution-as-detailed-plan, pp. 360-361; for arguments by opposing attorney Jones in favor of a narrow construction of the Constitution-as-detailed-plan, p. 361; for arguments by opposing attorney Martin in favor of a narrow construction of the Constitution-as-detailed-plan, pp. 361-362; for the Court's unanimous ruling in favor of the Constitution-as-general-blueprint and against the Constitution-as-detailed-plan, which was delivered by Chief Justice John Marshall, pp. 368-370.

- <sup>81</sup> The cotton dust limits were to be "measured by a vertical elutriator, a device that measures cotton dust particles 15 microns or less in diameter" (p. 500).
- <sup>82</sup> Somewhat ironically, Bork was later appointed to be a federal appellate judge by President Reagan on the same circuit court that ruled against him in *American Textile Manufacturers Institute v. Donovan*. This occurred in 1982, just two years after the Supreme Court issued its ruling in the same case (Hall, 1992, p. 79). Five years later Reagan nominated him to fill Justice Powell's seat on the Court. The Senate Judiciary Committee vote was 9-5 in rejecting Bork, while the full Senate "defeated [Bork's nomination to the Supreme Court] by a vote of 58 to 42 on 23 October 1987" (Hall, 1992, p. 79). This occurred after "an unusually lengthy hearing" and "unprecedented efforts to mobilize grassroots opposition" to Bork's "conservative and legal views, particularly those relating to the constitutional right to privacy and the First Amendment" (Hall, 1992, p. 70). The Court seat was viewed by nonconservatives as "crucial because of Justice Powell's swing vote in many civil rights and liberties cases and because of his support of *Roe v. Wade* (1973)" (Hall, 1992, p. 79). After his nomination was defeated, Bork resigned from the court of appeals and "became a resident scholar at the American Enterprise Institute" (Hall, 1992, p. 79).
- <sup>83</sup> The first case, *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935), was decided on January 7, 1935. Responding to demands by the oil-producing states for federal controls on production to remedy the collapse of oil prices, Congress, as part of the National Industrial Recovery Act of 1934 "authorized the president to prohibit the shipment in interstate commerce of petroleum produced in excess of quotas fixed by the states (popularly referred to as 'hot oil')" (Hall, 1992, p. 619). By an 8-1 majority, the Court invalidated the "'hot oil' program ... of the NIRA" as "an unconstitutional delegation of legislative power to the president" (Hall, 1992, p. 619). *Panama Refining Company v. Ryan* marked the Court's first invalidation of federal legislation on the grounds of unconstitutional delegation of legislative authority, which was derived from the concept of "[s]eparation of powers [as] a basic principle of the Constitution" (Hall, 1992, p. 619). Chief Justice Hughes authored the Court's opinion and "held the statute invalid because Congress had established no 'primary standard,' leaving the matter to the president without direction or rule, 'to be dealt with as he pleased'" (Hall, 1992, p. 619).

The second case, *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935), was decided on May 27, 1935, a day known as "the New Deal's 'Black Monday'" (Brogan, p. 548). *Schechter* also focused upon the National Industrial Recovery Act. Congress had enacted the NIRA in order to "curb unemployment and stimulate business recovery" during the Great Depression (Hall, 1992, p. 757). The NIRA "reflected a variety of different demands" from different quarters, which included (Leuchtenburg, p. 56):

- "theorists of the Progressive era" (Leuchtenburg, p. 56);

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- the “doctrines of “the New Nationalism” proclaimed by the “old Bull Moosers” (Leuchtenburg, p. 56);
  - the “urban social reformers of the Jane Addams tradition” as carried forward to the “campaign for public works” (Leuchtenburg, pp. 33, 56);
  - the older Wilsonians’ beliefs in “the need for national planning” and their experience with the War Industries Board in “government co-ordination [sic] of the economy during the war” (Leuchtenburg, pp. 56, 57);
  - the industrialists and business leaders who wanted the government to “suspend the antitrust laws to permit trade associations to engage in industrywide planning” (Leuchtenburg, p. 56);
  - various union leaders “who were willing to agree to business proposals for a suspension of the antitrust laws because they assumed the Supreme Court would not sanction a federal wages and hours law” and viewed “industrial codes” as “badly needed protection” for the “high-wage businessmen” in order not to be undersold by businessmen “exploiting their workers” (Leuchtenburg, p. 57); and
  - by Senator Wagner, who “insisted that if business received concessions labor must have a guarantee of collective bargaining” (Leuchtenburg, p. 57).

As described in one account, “All shared a common revulsion against the workings of a competitive, individualistic, laissez-faire economy” (Leuchtenburg, p. 56). The Act’s “principal reliance was upon codes of fair competition, which all industry groups were directed to draw up” (Hall, 1992, p. 757). However, as one historian noted, “[I]t was easier to get codes agreed than to secure compliance with them” (Brogan, p. 548). Such was indeed the situation in Brooklyn with the code regulating “the trade in kosher fowls in the New York area” where the Schechter Corporation “violated numerous provisions of the code eighteen times” (Brogan, p. 548). Protesting its indictment, the Schechter Corporation challenged the constitutionality of the NRA code governing its business. In a unanimous decision, the Supreme Court invalidated the code provisions of the NIRA. The Court ruled:

that the grants of power made by Congress to the President in the codes provision of the NIRA were beyond the limits imposed by the Constitution, amounting to ‘an unconstitutional delegation of legislative power’ – for they enabled the President to make what laws he liked for the regulation of any economic activity whatever. (Brogan, p. 549)

Neither the *Panama* nor the *Schechter* decisions have ever been overruled by the Court. According to one legal scholar, “*Panama*, (nearly always paired with *Schechter*) has been cited in more than forty subsequent Supreme Court decisions, typically where administrative exercise of delegated power was involved” (Hall, 1992, p. 619). “But,” the legal scholar continued, “in none of these cases was the congressional delegation held invalid” (Hall, 1992, p. 619). Justice Byron White observed of the delegation issue in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 985 (1983), that “restrictions on the scope of the power that could be delegated [have] diminished and all but disappeared” Hall, 1992, p. 757).

<sup>84</sup> Alger Hiss would later work for Dean Acheson at the State Department and would be accused by Whittaker Chambers of being a Soviet spy in the celebrated Pumpkin Papers Case. Long before that happened, however, he was a graduate of Harvard Law School recruited by the “liberal faction in the Department of Agriculture headed by the assistant secretary, Rexford Tugwell, and by the volatile general counsel, Jerome Frank” (Leuchtenburg, pp. 76, 75). Leuchtenburg described the group as follows:

These men wanted to exploit the sense of crisis to push through long-needed reforms to relieve the poverty of sharecroppers, tenant farmers, and farm laborers, and to crack down on packers, millers, and big milk distributors to make sure that increased farm prices came out of middlemen and not the consumer. “Henry’s father’s gang,” as they called the old hands in the Department, scorned the Tugwell-Frank crowd as a strange crew of urban intellectuals whose knowledge of agriculture, such as it was, came not from tilling the upper forty but from books. (Leuchtenburg, p. 76)

Henry, of course, was Henry Wallace, the native Iowan serving as the Secretary of Agriculture. “Henry’s father’s gang” was headed by George Peek, the administrator of the AAA. According to Leuchtenburg, Peek “argued that there was no farm surplus, only a disparity in price, and that the country needed more people in agriculture than fewer.

Peek reasoned: “It is not a healthful thing from any angle to have people crowded together in industrial centers where they may become the victim of every ‘ism’ of any agitator. The healthsome atmosphere of the country is far better for all of us.” He had a pioneer’s hatred of the “un-American policy” of restricting production. He would let the farmer grow all he wanted, negotiate marketing agreements to push up farm prices, and dump the surplus overseas. (Leuchtenburg, p. 75)

Peek was moved by FDR to the State Department and Chester Davis became the new AAA Director. Davis was “sympathetic” to the Tugwell-Frank’s group’s pleas on behalf of “the politically voiceless sharecroppers and tenants,” despite his thinking that “the main purpose of the Triple A was farm recovery rather than overhauling the rural power structure” (Leuchtenburg, p. 139). While Davis was out of town, “Alger Hiss of the Legal Division drafted an opinion, approved by Frank, which required planters to retain the same individuals as tenants during the life of the contract” which Frank then circulated as a new AAA edict (Leuchtenburg, p. 139). When Davis found out, “he canceled the directive,” and with the backing of both Wallace and Roosevelt, “wiped out the office of General Counsel and ousted Frank” as well as four other top officials (Leuchtenburg, p. 139). Hiss resigned in protest. According to Leuchtenburg, “Liberals viewed the ‘purge’ of the Frank faction as the end of an era, the triumph of the planters and processors over the advocates of a ‘social outlook in agricultural policy’” (Leuchtenburg, p. 139).

Later an investigative journalist, I.F. Stone, recounted the events surrounding Hiss’s efforts at the Ag Department and commented on Alger Hiss during an interview:

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I was never able to make up my mind about Hiss. I admired him when he and two others walked out of the Agriculture Department. There were two Section 7's in the New Deal that were controversial and crucial. There was the one that was in the National Recovery Act, giving labor the right to organize – although it had a lot of ambiguity in it. And there was the other, in the Triple A Act, designed to make sure that when the government subsidized a withdrawal of acreage from crops such as cotton, that part of the benefits would go to the sharecroppers and tenant farmers, so the big landowners couldn't take the money and keep it and throw the 'croppers and tenants off of the land. It was a very fundamental issue. Henry Wallace was then Secretary of Agriculture, and he wasn't what he became later on. He represented the big farmers. And ... Hiss walked out in protest. The New Deal tried to remedy a little of that, but it was never really enforced... So I admired Hiss for that. (Patner, p. 85)

- <sup>85</sup> According to the Court's description of the Agricultural Adjustment Act, Section 1 of Title I of the Act

recite[d] that an economic emergency ha[d] arisen, due to disparity between the prices of agricultural and other commodities, with consequent destruction of farmers' purchasing power and breakdown in orderly exchange, which, in turn, have affected transactions in agricultural commodities with a national public interest and burdened and obstructed the normal currents of commerce, calling for the enactment of legislation. (p. 53)

- <sup>86</sup> George Wharton Pepper served as the "Biddle Professor of Law" at the University of Pennsylvania for seventeen years before he resigned to devote full-time efforts to his law practice (Hall, 1992, pp. 630-631).
- <sup>87</sup> Evoking the "legendary Four Horsemen of the Apocalypse," the phrase was used during the mid-1930's to describe the opposition of the following four Supreme Court justices to the New Deal's efforts to legislate on economic and social matters: "Pierce Butler, Willis Van Devanter, George Sutherland, and James McReynolds" (Hall, 1992, p. 309).
- <sup>88</sup> See the following pages of this paper criticizing the Court majority for using the Tenth Amendment to limit congressional application of a delegated power or for noting the lack of a textual basis in the Amendment for limiting the application of a specifically delegated power: for Justice Stevens's dissent against Justice Rehnquist's majority opinion in *National League of Cities v. Usery*, pp. 403-404; for Justice Brennan's dissent (joined by Justices Marshall & White) against Justice Rehnquist's opinion in *National League of Cities v. Usery*, pp. 404-411; for Justice White's dissent (joined by Justices Blackmun & Stevens) against Justice O'Connor's majority opinion in *New York v. United States*, pp. 457-467; for Justice Stevens' dissent against Justice O'Connor's opinion in *New York v. United States*, pp. 467-469; for Justice Stevens' dissent (joined by Justices Souter, Ginsburg, & Breyer) against

Justice Scalia's majority opinion in *Printz v. United States* criticizing the lack of both textual and historical support for the majority opinion, pp. 495-496.

- <sup>89</sup> Wallace had anticipated that the AAA of 1933 might not survive the Court's scrutiny in *United States v. Butler* and "had put in place a team to devise a program that would meet constitutional objections" (Cutler & Hyde, p. 160). Within four days of the Court's *Butler* decision, Wallace met with farm leaders and outlined the new program, subsequently implemented by Congress as the Soil Conservation and Domestic Allotment Act of 1936. The Court announced *Butler* on January 6, 1936, and the soil conservation legislation was enacted on February 27, 1936. The new program

empower[ed] the Agriculture Department to enter into rental agreements with farmers who would promise to replace certain soil-depleting crops – such as corn, wheat, cotton, and tobacco – with "green manure" such as grass and legumes. Money for the program would be appropriated by Congress. The plan would be administered at the local level by elected soil conservation district committees. The local committees, in turn, would be responsible to the department's Soil Conservation Service, which would determine conservation needs on a regional and national basis. (Culver & Hyde, pp. 160-161)

The Soil Conservation and Domestic Allotment Act of 1936 was described as "a doubly sweet victory for Wallace" because he "had rescued the farm relief program and returned soil conservation services to the Agriculture Department all at once" (Culver & Hyde, p. 161). Another historian described the new farm bill as "reflect[ing] the intense national concern with soil conservation aroused by the terrible dust storms of the early 1930's" which had caused "red snow to [fall] on New England," had "darkened the city of Cleveland" with "a dust cloud seven thousand feet thick," had caused "yellow grit from Nebraska [to sift] through the White House doors," and had caused "bits of [the] western plains [to come] to rest on vessels in the Atlantic three hundred miles at sea" (Leuchtenburg, p. 172). While the Act of 1936 undoubtedly increased both awareness and practice of soil conservation measures by farmers, it "proved unworkable" in terms of reducing the supply of farm commodities as "not enough farmers [cooperated] voluntarily to limit production" (Leuchtenburg, p. 254). Continuing his evaluation of the Act's economic ineffectiveness, the historian noted, "The south staggered under an eighteen-million-bale crop which drove cotton prices down, and wheat growers faced a new glut" as part of the recession in the fall and winter of 1937 (Leuchtenburg, p. 254).

Another measure aimed at economic relief for rural Americans was passed in the wake of the Court's *Butler* decision prior to the second AAA, but not quite as quickly as the soil conservation measure. The Bankhead-Jones Farm Tenancy Act of 1937 was enacted by Congress partly as a result of the *Butler* decision, partly as a result of "the threat posed by Huey Long" to southern leadership, and partly as a result of Agriculture Secretary Wallace's increased awareness of the extreme rural poverty he witnessed first-hand on "an incredible odyssey along back roads of the Mississippi Delta, across the Great Smoky Mountains and into the hollows of Appalachia" in November 1936 (Leuchtenburg, p. 140; Culver & Hyde, p. 169). The Bankhead bill was first introduced in 1935 "to help tenant farmers and farm



laborers become landowners,” but was resisted by both southern conservatives and northern radicals because for the former, the bill was too “revolutionary,” while for the latter the bill “would set up a caste of peasantry” (Leuchtenburg, pp. 140, 141). Discussed again in the aftermath of the *Butler* decision, it continued to languish until “it received the blessing of the President’s Special Committee on Farm Tenancy in 1937” (Leuchtenburg, p. 141). Agriculture Secretary Wallace chaired the President’s committee following his trip along “[t]wo thousand miles of Tobacco Road” in late 1936, an experience that “appalled and unsettled Wallace” (Culver & Hyde, pp. 169, 170). According to one account:

He [Wallace] returned from the South with a willingness, heretofore resisted, to engage his department in the politics of rural poverty [For his contrasting prior record, see note # 82]. Subsistence farmers scratching out a living on worn-out land, landless tenants, sharecroppers, and day laborers made up half of the nation’s agricultural work force, yet they received only 12 percent of the national farm income. They obtained virtually no help from farm subsidies aimed at commercial farmers and landlords. (Culver & Hyde, p. 170)

Of his own reaction to what he witnessed on his tour, Wallace wrote, “I have never seen among the peasantry of Europe poverty so abject as that which exists in this favorable cotton year in the great cotton states” (Culver & Hyde, p. 170). The Bankhead-Jones Farm Tenancy Act created the Farm Security Administration (FSA) within the Department of Agriculture to extend “long-term loans to tenant farmers for the purchase of land and equipment” (Culver & Hyde, p. 170). The Act also “extended rehabilitation loans to farmers” and provided assistance to migrant workers “by establishing a chain of sanitary, well-run migratory labor camps” (Leuchtenburg, p. 141). According to one assessment, “The FSA was the first agency to do anything substantial for the tenant farmer, the sharecropper, and the migrant” (Leuchtenburg, p. 141). Closer to Iowa, the FSA “reaped the anger of Twin Cities grain dealers when it lent money to co-operatives to buy grain elevators” and was “scrupulously fair in its treatment of Negroes” (Leuchtenburg, p. 141). Yet, for all of its positive accomplishments, the Farm Tenancy Act was never able to “measure up to the dimensions of the problem it faced” (Leuchtenburg, p. 141).

The main boast of the FSA – that the rate of repayment of its loans was impressively high – suggested that the FSA did not dig very deeply into the problem of rural poverty. The FSA had no political constituency – croppers and migrants were often voteless or inarticulate – while its enemies, especially large farm corporations that wanted cheap labor and southern landlords who objected to FSA aid to tenants, had powerful representation in Congress. The FSA’s opponents kept its appropriations so low that it was never able to accomplish anything on a massive scale. (Leuchtenburg, p. 141)

Thus, the two agricultural acts passed by Congress between the voiding in early 1936 of the first Agricultural Adjustment Act of 1933 and the passage of the second Agricultural

Adjustment Act of 1938, while helpful in terms of addressing soil conservation needs and providing some relief for the problem of rural poverty, didn't effectively deal with the problem of the overproduction of agricultural commodities, which, as a result, didn't impact the problem of low prices for farm products and the low purchasing power of rural America.

- <sup>90</sup> In describing the ever-normal granary, one historian compared Wallace to the Old Testament Joseph who stored up surpluses "when yields were good and distribut[ed] them in lean years" (Leuchtenburg, p. 255). As described in another account, Wallace:

had written and spoken of it [the ever-normal granary] for most of his adult lifetime. He had documented its origins in Confucius and found scriptural support for it in the biblical story of Joseph. He had preached its benefits to a generation of *Wallace's Farmer* readers and had talked of it again and again during the two great droughts of the 1930s. (Culver & Hyde, p. 178).

Wallace's success in getting the concept of the ever-normal granary enacted as part of the Agricultural Adjustment Act of 1938 was described by Wallace as the "action of which I was most proud as secretary of agriculture" (Culver & Hyde, p. 179).

- <sup>91</sup> While democratic participation was embedded in the Act, it should be noted both who participated and who did not participate, as well as who directly benefited and who did not. One historian noted:

The farmers who took the lead in the administration of the AAA were not the worst-hit victims of the Depression: not the sharecroppers of the South, the tenants of the Middle West, the hired hands everywhere, the illiterate, the black, the ignorant, the smallholders trying to live off pocket-handkerchief holdings, owners of exhausted land, or young men and women forced to stay on the land because there was no work in the cities. (Brogan, p. 554)

Further noting that "the big commercial farmers and, in the South, the landlords" dominated the workings of the AAA, partly because the "AAA subsidies were paid ... to acres, not individuals," the commentator also pointed out that they were greatly helped by "abundant collusion from within Congress and the Department of Agriculture" in strengthening "their position more ruthlessly and determinedly than big business did under NRA, and with far more permanent success" (Brogan, p. 555). The question arose, "Against whom did the large commercial agricultural interests strengthen their position?" As further noted, it was the "reforming followers of Tugwell within the administration" and the "organizations of poorer farmers outside it" who were able to make "no great headway against" the commercial farming interests (Brogan, p. 555). The rising tide of prosperity brought about by the demands of World War II also worked to diminish the "sense of social solidarity as had been induced in 1932" as well as the perceived need to reform agriculture. The consequences were spelled out with attention being drawn to the inherent conflict between the rhetoric focused on family farms and the policies pursued which favored further consolidation of

larger and fewer farms with no attention given to those displaced by the process. As noted by our historian:

[A]fter 1941 (when the factory boom of the Second World War opened up the job market again) the movement from the land to the cities resumed. It was probably an economically necessary process; but the human and political gains to America would have been enormous if the movement could have been regulated with intelligence and compassion, instead of being left, in the old way, to the brutally impersonal operations of 'the profit system', which were only marginally braked by the commitment of the New Deal and succeeding administrations to maintain the existing farm population *in situ*. (Brogan, p. 555)

The historian described the cyclical process of continuing the process begun by the two major farm acts of the New Deal.

Agriculture Secretaries came and went and made the same pledges to uphold the small family farm (anything was better than the effort and conflict involved in thinking out a new policy); but the number of such farms went on shrinking, and nobody did much for the displaced. (Brogan, p. 555)

<sup>92</sup> Hall (1992, p. 426) listed some of the specific cases by which various provisions of the Bill of Rights came to be protected against intrusion by state and local governments via the Fourteenth Amendment. In *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897), the Supreme Court "unanimously held that the Fourteenth Amendment's Due Process Clause compelled the states to award just compensation when it took private property for public use" (Hall, 1999, p. 51). Justly famed for his ringing dissents, this case proved to be one in which Justice John Marshall Harlan wrote the Court's unanimous opinion. Perhaps the Court selected Justice Harlan to write the majority decision in *Chicago, Burlington & Quincy Railroad Company v. Chicago* because of his previous dissent in *Hurtado v. California*, 110 U.S. 516 (1884), in which he argued that Hurtado's murder conviction and death sentence had proceeded without meeting the "Fifth Amendment requirement of grand jury indictment in federal capital cases" (Hall, 1999, p. 133). According to Justice John Marshall Harlan's dissent, "[D]ue process of law,' within the meaning of the national Constitution, does not import one thing with reference to the powers of the States, and another with reference to the powers of the general government" (Hall, 1992, p. 362). In *Hurtado*, the Court rejected Justice Harlan's claim that the Fourteenth Amendment incorporated the Fifth Amendment's requirements as a binding requirement on state action. Deprivation of life wasn't sufficient reason for the Court majority to agree to Harlan's argument, but perhaps the passage of time, the persuasiveness of Harlan's reasoning, and the threat of deprivation of property combined to change the Court's reasoning regarding the claim that the Fourteenth Amendment mean state and local governments had to respect the Bill of Rights, or at least the Fifth Amendment portion of the Bill of Rights.

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Subsequently, in *Gitlow v. New York*, 268 U.S. 652 (1925), the Court held “that the speech and press protections of the First Amendment should be extended to the states” (Hall, 1999, p. 106). The Court, however, rejected Gitlow’s free speech claim put forth by his attorney, Clarence Darrow, during the trial before the New York court, and carried forward by ACLU attorney Walter H. Pollak before the U.S. Supreme Court. Pollak argued

that liberty of expression was a right to be protected against state abridgment. This, he contended, was established by the authoritative determination of the meaning of liberty as used in the Fourteenth Amendment and by implicit declarations with respect to the related right of free assembly. (Hall, 1999, p. 106)

Justices Louis D. Brandeis and Oliver Wendell Holmes, while agreeing with the Court majority that state and local governments were obligated to respect the provisions of the First Amendment, disagreed with the Court majority “that words separated from action could be punished” (Hall, 1999, p. 106). Holmes’ and Brandeis’ view that expression and action should be separated and viewed as separate activities, that action (and not expression) could be punished was not “embraced by the Supreme Court” until the 1960s (Hall, 1999, p. 106). In 1931, however, the Court did strike down a state law as an unconstitutional infringement of First Amendment free speech. *Stromberg v. California*, 283 U.S. 359 (1931)

is considered a milestone in First Amendment constitutional law, for it was the first ruling in which a Court majority extended the Fourteenth Amendment to include a protection of First Amendment substance – in this case symbolic speech – from state encroachment. (Hall, 1999, p. 296)

The most comprehensive argument for the Incorporation Doctrine was expressed by Justice Hugo Black in a dissenting opinion joined by three other justices in *Adamson v. California*, 332 U.S. 46 (1947). Dissenting against the 5-4 decision in *Adamson*, Justice Black argued “the Fourteenth Amendment required the states to respect all rights specified in the Bill of Rights” (Hall, 1992, 427). According to Justice Black:

[T]he due process clause should be read to guarantee that “no state could deprive its citizens of the privileges and protections of the Bill of Rights” and ... that the Fourteenth Amendment incorporates “the full protection of the Fifth Amendment’s provision against compelling evidence from an accused to convict him of a crime.” (Hall, 1999, p. 5)

Ironically (ironic by virtue of this position being articulated in a minority dissenting opinion rather than a majority opinion establishing a basic legal principle), Justice Black’s position, to some extent, mirrored that originally proposed by James Madison to the House of Representatives on August 24, 1789. Madison’s proposal for Article XIV stated that “no state shall infringe the right of trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press” (Amar, 2005, p. 386). Although approved by the

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House, Madison's proposal was defeated by the Senate. The idea lay dormant until resurrected by Congressman Bingham's proposal for the successful Fourteenth Amendment (Amar, 2005, p. 386). In his public remarks:

Bingham repeatedly pointed his audience to the leading Supreme Court opinion, *Barron v. Baltimore*, authored by Chief Justice Marshall in 1833. *Barron* said that if the First Congress had meant to apply the Bill of Rights to states, Congress would have used explicit words to that effect, just as the Philadelphia framers had used explicit words in Article I, section 10 when they imposed various limits on state governments. Taking his cue from *Barron*, Bingham decided to use the very Simon-Says language the *Barron* Court had called for; thus, his proposal borrowed the words, "No State shall" verbatim from Article I, section 10.

Bingham's public explanations of his proposed amendment repeatedly linked the phrase "privileges or immunities of citizens" to "the bill of rights." (Amar, 2005, p. 387)

While the Court "has never adopted Black's 'total incorporation' approach..., [i]t has, however, incorporated nearly all the individual components of the Bill of Rights under a doctrine called 'selective incorporation'" (Hall, 1999, p. 5).

<sup>93</sup> The other two amendments were the Thirteenth Amendment that abolished slavery and the Fifteenth Amendment that eliminated "race, color, or previous condition of servitude" as reasons to deny citizens the right to vote.

<sup>94</sup> Senator J.W. Grimes of Iowa served as one of the six senators on the Joint Committee of Reconstruction, which was chaired by Senator William Pitt Fessenden of Maine (Stamp, p. 110, n. 7). The remaining senators were Ira Harris (New York), J.M. Howard (Michigan), Reverdy Johnson (Maryland), and G.H. Williams (Oregon). They were joined by Representatives J.A. Bingham (Ohio), H.T. Blow (Missouri), G.S. Boutwell (Massachusetts), Roscoe Conklin (New York), Henry Grider (Kentucky), J.S. Morrill (Vermont), A.J. Rogers (New Jersey), Thaddeus Stevens (Pennsylvania), and E.B. Washburne (Illinois). Although the Joint Committee had been created by a joint effort by both "the radicals and moderates" in Congress, and although "some of the leading radicals served" on the Joint Committee on Reconstruction, "the moderates actually controlled it" (Stamp, p. 110).

<sup>95</sup> The Preliminary Emancipation Proclamation confirmed

the rights of slave-holders in the loyal states, and even in those parts of the Confederacy which had been reconquered (chiefly Louisiana and the Sea Islands off the coast of South Carolina). (Brogan, p. 340)

The Preliminary Proclamation also stipulated that slaves in the disloyal areas "if their masters made peace by 1 January 1863" (Brogan, p. 340). However, if by 1 January 1863 the "states designated should still be in rebellion, the slaves would be 'then, thenceforward, and forever free'" (Brogan, p. 340).

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- <sup>96</sup> Congressmen from Iowa included William B. Allison, Josiah B. Grinnell, Asahel W. Hubbard, Hiram Price, John A. Kasson, and James F. Wilson, all of whom voted for the proposed Thirteenth Amendment (Keller, pp. 207-209).
- <sup>97</sup> Senators representing Iowa in the Thirty-eighth Congress included James W. Grimes and James Harlan, both of whom voted in favor of what became the Thirteenth Amendment (Keller, p. 206).
- <sup>98</sup> Black Codes is a term referencing state laws passed by southern state legislatures in the aftermath of the Civil War to maintain white control over the newly freed slaves. Having had to adopt the Thirteenth Amendment abolishing slavery as a pre-condition for re-admission to the Union under President Johnson's program of reconstruction, southern states passed these laws as a way to maintain the slavery laws under a different guise. A historian specializing in nineteenth century southern history identified the well-spring from which the Black Codes were drawn:

Whites clung unwaveringly to the old doctrine of white supremacy and innate Negro inferiority that had been sustained by the old regime.... The temporary anarchy that followed the collapse of the old discipline produced a state of mind bordering on hysteria among Southern white people. The first year a great fear of black insurrection and revenge seized many minds, and for a longer time the conviction prevailed that Negroes could not be induced to work without compulsion.... In the presence of these conditions the provisional legislatures established by President Johnson in 1865 adopted the notorious Black Codes. (Woodward, 1966, pp. 22-23)

An outside observer, upon reviewing the situation, commented on the Black Codes and observed, "Provisions varied somewhat from state to state, but on the whole it is true to say that the codes ... in every other respect tried to maintain the slavery laws" (Brogan, p. 362). He concluded by noting that all Black Codes in every southern state "forbade freedmen the use of weapons of any kind" (Brogan, p. 363). Brogan continued:

So much for the Northern crusade for human equality. As a leading Northern liberal, Carl Schurz, remarked, the codes embodied the idea that although individual whites could no longer have property in individual blacks, "the blacks at large belong to the whites at large." (Brogan, p. 363)

- <sup>99</sup> Patrick, n., p. 65.
- <sup>100</sup> Woodward, 1951, p. 62.
- <sup>101</sup> Woodward, 1951, p. 400.
- <sup>102</sup> Perhaps this was, in part, a culmination of a "movement to get rid of illiteracy through education," an effort that had begun in 1911, and that had involved "statewide campaigns designed to reduce illiteracy" in Kentucky, Alabama, Arkansas, Mississippi, Georgia, and

South Carolina (Butts, p. 64). Despite these efforts, “[w]hen the United States entered World War I, the Army found that about 700,000 young men could not write their names on their draft-registration cards” (Butts, p. 64). Education and literacy thus became intertwined with patriotism and military preparedness.

However, while illiteracy had been reduced between the two world wars, the idea of simple literacy no longer sufficed. By the time “the selective service law went into effect in September, 1940, the Army found that many men could not read and write well enough for military purposes. More than 1,000,000 were rejected for this reason” (Butts, p. 65). Literacy, the ability to read and write, was not enough to meet the demands of modern life; hence, the idea of “functional literacy emerged.

While the effort to establish “free education beyond the primary-school years” had begun “in the three decades after 1870,” only a foothold had been established by 1910 (Hofstadter, p. 324). The literacy and functional literacy needs of an industrial society emerging as a world power provided support for expanding the system of public education to include a secondary education for the nation’s students. The figures below illustrate the increase (Hofstadter, p. 325):

	<u>1910</u>	<u>1960</u>
Percent of Seventeen-year-olds in HS	35 %	70 %

<sup>103</sup> The eighteen northern states in 1860 were: Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New Jersey, New York, Pennsylvania, Ohio, Indiana, Michigan, Wisconsin, Minnesota, Iowa, Illinois, Oregon, and California (Williams, p. 474 & p. 478). Kansas joined the Union on January 29, 1861, with the removal (following the secession of their states from the Union) of the southern Democrats who had blocked Kansas’ admission as a free state (Pearson, Self, & Socolofsky, p. 192i). West Virginia, formed from counties in western Virginia who refused to secede from the Union with Virginia in 1861, joined the Union as a state on June 20, 1863, and contributed 30,000 soldiers to the Union forces (Hoffman, Jones, & Little, pp. 181-182).

While the four border states of Delaware, Maryland, Kentucky, and Missouri never left the Union in 1861, they were slave states whose citizens served in opposing armies. While “[m]en from every state fought in both armies,” it was more evenly divided between the two sides in the four border states (Williams, p. 478). “[S]ecessionist groups from Kentucky and Missouri set up their own state governments, and even sent representatives to the confederate Congress” (Williams, p. 478).

The eleven southern states who seceded from the Union and formed the Confederate States of America were: Virginia, North Carolina, South Carolina, Tennessee, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, and Texas (Williams, p. 474 & p. 478).

While not yet official states of the Union at the time of the Civil War, the following territories “fought on the Union side:” Colorado, Dakota, Nebraska, Nevada, New Mexico, Utah, and Washington (Williams, p. 478).

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- <sup>104</sup> Justice Bradley served on the electoral commission which had been created to determine the winner of the 1876 presidential election between Samuel Tilden, a Democrat, and Rutherford B. Hayes, a Republican. A legal scholar described Bradley's role on the electoral commission as well as subsequent activities on the nation's High Court bench:

On a commission equally balanced between Democrats and Republicans, Bradley was assigned the role of swing man. Although apparently pulled in both directions, he closed ranks with his fellow Republicans and declared Rutherford B. Hayes president-elect. As if in support of Hayes's conciliatory policy toward the South, Bradley later authored the opinion of the Court in the notorious *Civil Rights Cases* (1883), invalidating key provisions of the Civil Rights Act of 1875. (Hall, 1992, p. 82)

- <sup>105</sup> Justice Bradley used the term "corrective" to refer to legislation on pp. 15-16, 18-20, & 23 in his majority opinion in the *Civil Rights Cases*, 109 U.S. 3 (1883). Justice Bradley used some form of the word "regulate" on pp. 18-19 of the same case. Finally, the phrase "direct and plenary powers of legislation over the whole subject" was used by Justice Bradley in his majority opinion for the *Civil Rights Cases* on p. 18.
- <sup>106</sup> The cases are grouped according to information contained in the cases themselves: *Brown v. Board of Education*, 347 U.S. 483; and *Bolling v. Sharpe*, 347 U.S. 497.
- <sup>107</sup> The two categories of state laws are self-explanatory; however, the geographic groupings within the one category require some explanation. The "Deep South" grouping is familiar, but the "Border States" grouping is not as clear. "Border States" are those states that were *slave states* situated on the border between the North and the Deep South before and during the Civil War. Most of them had close economic ties to the North, but family connections and slavery tied these states to the South. All of the border states remained within the Union following the formation of the Confederacy and the commencement of the Civil War with the exception of Virginia. When Virginia seceded and joined the Confederacy, her western counties did not; Subsequently, they became the separate state of West Virginia.
- <sup>108</sup> Data for the system of racially segregated schools for public education in the United States at the time the *Brown* decision was delivered by the Court in May, 1954, was gathered from Luther A. Huston's "Special" to *The New York Times* of May 17, 1954, which appeared the following day on the front page of that newspaper under the headlines "High Court Bans Segregation; 9-0 Decision Grants Time to Comply" along with the sub-headlines "1896 Ruling Upset" and "'Separate but Equal' Doctrine Held Out of Place in Education."
- <sup>109</sup> Hall, 1992, p. 631, provides the Latin translation as well, "by the court."
- <sup>110</sup> What Hamilton actually wrote follows. After discussing the idea of sovereign immunity and after declaring that state governments enjoyed sovereign immunity, Hamilton wrote:

The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there



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established will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. (*The Federalist*, No. 81, p. 456)

- <sup>111</sup> As Professor Mathis noted, “Alexander J. Dallas, who wrote the reports which are generally recognized as official for the first years of the Supreme Court, does not give the background facts of the case” (Mathis, 1968, p. 217, n. 38). Mathis then provided the pertinent background facts, which included the following account of Farquhar’s untimely demise that resulted in Alexander Chisholm being appointed executor of his estate:

Still having failed to collect for the sale to Stone and Davies in 1777, Farquhar was knocked overboard and drowned when he was hit by the boom of a pilot boat coming into Savannah in January, 1784. Farquhar’s will provided that practically all of his estate was to pass to his daughter Elizabeth who was only ten years old at his death. Alexander Chisholm of Charleston was named executor of the estate until Elizabeth should become of age. Chisholm and Peter Trezevant, who married Elizabeth Farquhar in 1789, were responsible for most of the later efforts to obtain payment of the Farquhar claim. (Mathis, 1968, p. 218)

- <sup>112</sup> Professor Mathis’ research provided the missing details. According to Professor Mathis’ findings:

Thomas Stone and Edward Davies were commissioned by the Executive Council of Georgia to make a large purchase from Robert Farquhar, a merchant.... It was agreed that Farquhar was to receive \$169, 613.13 for the merchandise. Delivery was made on November 3 with payment to be made by December 1. On the day after the payment was due Farquhar requested the money, but was refused as was to be the case on numerous later occasions. It seems that Georgia paid Stone and Davies the necessary sum in continental loan office certificates for the purpose of paying the debt, but Farquhar, from all evidence obtained, received no part of the funds. (Mathis, 1968, pp. 217-218)

- <sup>113</sup> Since the middle of the Twentieth Century, “there has been a dramatic increase in concurring and dissenting opinions” (Hall, 1992, p. 780). In some cases, it appeared as if the Court had reverted back to the English practice of *seriatim* opinions. In several cases each of the nine justices authored individual opinions, either in concurrence or in dissent, e.g., “the Pentagon

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Papers case of *New York Times v. United States* (1971) and the capital punishment case of *Furman v. Georgia* (1972)” (Hall, 1992, p. 780).

<sup>114</sup> “Acadia and Justice” – retrieved December 13, 2004, from <http://www.ac.wvu.edu/~jay/pages/evangel.html>.

<sup>115</sup> The series of bizarre events that commenced with Georgia’s deliverance of funds to the two agents, monies that were never delivered to the merchant, continued even after the award of money in 1794, not to Farquhar’s daughter, but to her husband, Trezevant. Although Trezevant sold three of the certificates in order to pay the expenses incurred in trying to collect the money, “Trezevant continued to hold five certificates valued at £5,000” (Mathis, 1968, p. 223). Trezevant apparently continued to hold the certificates “for more than forty years” (Mathis, 1968, p. 223). In 1799 the Georgia legislature legislated that “all certificates issued by the state should be renewed within two years or ‘be thenceforth deemed fraudulent and forever barred’” (Mathis, 1968, p. 223). Trezevant failed to renew the certificates as required, and subsequently moved to London. Later, when he presented his certificates, Georgia did not honor them since they hadn’t been renewed as required by law. Beginning November 19, 1838, Trezevant began presenting a series of petitions to the legislature for payment that were studied and denied each time. According to Professor Mathis:

In 1847, the Trezevant petition was again presented to the Georgia legislature. Favorable committee reports were made in each house and a bill for relief was passed by the House on December 18 and in the Senate on December 23. Thus, from the original sale to the final settlement the controversy brought before the Supreme Court in *Chisholm v. Georgia* had spanned a period of seventy years. (Mathis, 1968, pp. 223-224)

<sup>116</sup> What exactly transpired has been a source of confusion among historians and scholars. The debates and proceedings of the Second Congress (October 24, 1791, to March 2, 1793) do not contain a record of any specific resolutions being offered on the floor of the House from February 19, 1793 until its adjournment on March 2, 1793 (See *Annals of Congress*, 3, pp. 882-962). There are, however, general references made to resolutions without specifying their content. Professor Levy’s information about the resolution being offered on the floor of the House immediately following the Court’s decision in *Chisholm v. Georgia* came from the record of the Court’s decision in a subsequent case, *Cohens v. Virginia*, 6 Wheaton (19 U.S.) 264 (1821); (See Levy, p. 59, n. 24). Warren reported that a House member had offered the following resolution on February 19, 1793:

that no State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States. (Warren, p. 101)

However, Warren offered no citation for his source. Mathis reported the same resolution being offered on February 19, 1793, and cited the following sources: “Philadelphia Dunlap’s

American Daily Advertiser, Feb. 22, 1793; Salem (Mass.) Gazette, Mar. 5, 1793; Philadelphia Gazette of the United States, Feb. 20, 1793; Philadelphia Gazette and Daily Advertiser, Feb. 20, 1793; Philadelphia National Gazette, Feb. 23, 1793" (Mathis, 1968, p. 226, n. 73). Mathis further reported the resolution as being offered by "Theodore Sedgwick, Representative from Massachusetts" (Mathis, 1968, p. 226). Fletcher cited "Pa. J. & Weekly Advertiser, Feb. 27, 1793, at 1, col. 2" as the source for the same House proposal (Fletcher, pp. 1058-1059, n. 116). Fletcher then incorrectly reported that the House (instead of the Senate) offered a proposal on February 20, 1793; however the source for the February 20th action was reported correctly (Fletcher, pp. 1059; p. 1059, n. 117). Attempting to identify Warren's source, Judge Gibbons cited the Pennsylvania Journal, Feb. 20, 1793, as containing "similar but not identical language" and identified it as being "apparently his source" (Gibbons, p. 1926, n. 186). Gibbons also reported that a "search of the National Archives, moreover, has produced no evidence of such a resolution in official government records" and concluded that the "existence of such a resolution thus appears dubious" (Gibbons, p. 1926, n. 186). Jacobs did not mention the House resolution in his discussion of the congressional reaction to *Chisholm v. Georgia* (see Jacobs, pp. 64-65).

- <sup>117</sup> Senate proceedings were not open to the public as "the Senate sat with closed doors during its Legislative as well as its Executive sittings, from the beginning of the First Congress up to the 20th day of February, 1794, in the first session of the Third Congress" (Annals of Congress, 3, p. 10). While a record of the executive sessions of the Senate were kept of the First Congress, only an abbreviated record was included in the *Annals of Congress* for the Second Congress because of its "being in general a monotonous record" (Annals of Congress, 3, p. 10).
- <sup>118</sup> Because Rehnquist will subsequently belittle this work in the 5-4 decision reached in *Seminole Tribe of Florida v. Florida*, the reader should be aware of both the extensive nature of the research as well as the legal expertise behind the research, all of which appeared in peer-reviewed journals of law. The list, as provided by Justice Stevens in his concurring opinion in *Pennsylvania v. Union Gas Co.*, follows:

See, e.g., Marshall, Fighting the Words of the eleventh Amendment, 102 Harv. L. Rev. 1342 (1989); Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 Yale L.J. 1 (1988); Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425 (1987); Lee, Sovereign Immunity and the Eleventh Amendment: The Uses of History, 18 Urb. Law. 519 (1986); Shapiro, Wrong Turns: The Eleventh Amendment and the *Pennhurst* Case, 98 Harv. L. Rev. 61 (1984); Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889 (1983); Fletcher, A Historical Interpretation of the eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983); Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682 (1976). (*Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 24, n. 1 [Stevens, J., concurring])

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<sup>119</sup> One of the first actions taken by the First Continental Congress on July 12, 1775, was to create “three departments of Indian affairs – northern, southern, and middle” whose duties included the following: “to treat with the Indians ... [sic] in order to preserve peace and friendship with the said Indians and to prevent their taking any part in the present commotions” (Cohen, p. 9).

<sup>120</sup> A word of explanation regarding jurisdiction of federal question lawsuits is in order, particularly its origin in the Judiciary Act of 1789 and its subsequent treatment in the Judiciary Act of 1875. As explained by one legal authority:

The most significant restriction in the Judiciary Act of 1789 gave the trial of federal question suits to the state courts. Only upon appeal to the Supreme Court after a final decision was had in the highest court of a state might a federal question actually reach a federal court. (Except for a brief interlude in 1801-1802, federal courts did not obtain general trial jurisdiction over federal questions until 1875.) (Hall, 1992, p. 474)

<sup>121</sup> The textual basis for the logical fallacy in *Alden v. Maine* centers on, but is not limited to, the following articulations of the Rehnquist Court:

We have ... sometimes referred to the States’ immunity from suit as “Eleventh Amendment immunity.” The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. ...[T]he States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today ... except as altered by the plan of the Convention or certain constitutional Amendments.... Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which ... was enacted to allay lingering concerns about the extent of the national power. (pp. 713-714)

<sup>122</sup> For examples of Madison’s anti-British attitudes, see: Elkins & McKittrick, pp. 224, 234, 269, 376, 442, & 449; Ketcham, pp. 313, 328-329, 357, 361, & 365.

<sup>123</sup> The Robert Bork who fired Archibald Cox was the same Robert Bork who would be rejected by the U.S. Senate for a seat on the U.S. Supreme Court some fifteen years later. Ronald Reagan had successfully nominated Bork in 1982 to a seat on the U.S. Court of Appeals, District of Columbia Circuit in 1982 (Hall, 1992, p. 79). When Justice Powell retired, Reagan nominated Bork to fill the empty seat on the Court on July 1, 1987 (Hall, 1992, p. 79). Powell had represented a “swing vote in many civil rights and liberties cases” and had supported the Court’s *Roe v. Wade* decision (Hall, 1992, p. 79). Described as “ultraconservative,” Bork had also been “an outspoken critic of the one-person-one-vote decisions, as well as of the Court’s constitutional right to privacy and *Roe v. Wade* (Gormley,

pp. 418, 419). Bork had also opposed the Court's remedies "for public school segregation" (Gormley, p. 419).

Previously, during his academic career, Bork had been known as "an extremely conservative Yale law professor who 'drove the liberal Yale law students up the wall by arguing that everything that happened after January 1, 1937 [the beginning of the Supreme Court's liberal New Deal decisions] was outrageous'" (Gormley, p. 357). Regarding his role in firing Cox at Nixon's behest, Bork believed that "the president was justified in asking the attorney general to fire Cox," that "Cox deserved to be fired," that Nixon "had the power to [fire Cox]," and that "it really wasn't his [Bork's] role to question the exercise of that power, but rather to carry out the President's wishes" (Gormley, pp. 365, 367). The only reservation Bork had about his role was that "his friends would view him as an 'apparatchik,' someone blindly devoted to his superiors" (Gormley, p. 366).

During Bork's confirmation hearings for the Supreme Court position, Senator Ted Kennedy "personally grilled nominee Bork" by quoting from "Cox's newly published book, *The Court and the Constitution*" (Gormley, p. 420). Kennedy concluded his examination of Bork by holding the book "in midair" and stating, "I think that most Americans would agree that the man who fired Archibald Cox does not deserve to be promoted to Justice on the Supreme Court" (Gormley, p. 421). According to one description, "Images of Senator Kennedy holding Cox's book aloft and chastising the Supreme Court nominee appeared on television networks across the country" (Gormley, p. 421).

Bork's confirmation hearing was "unusually lengthy" (Hall, 1992, p. 79). The Senate Judiciary Committee rejected Bork's nomination by a 9-5 vote (Hall, 1992, p. 79). One observer attributed Bork's rejection to a number of factors: "his widely articulated jurisprudence, the success of well-organized interest groups' opposition, [and] his prickly performance during his confirmation hearings" (Hall, 1992, p. 597). On October 23, 1987, the full Senate rejected Bork's nomination "by a vote of 58 to 42" (Hall, 1992, p. 79). Bork was one of only twenty-five nominations the "Senate has rejected or forced a president to withdraw" since 1789, an event that happened "only five times in the twentieth century" (Hall, 1992, p. 596). The 58 – 42 rejection of Bork constituted "the largest margin of defeat for any Supreme Court nominee in American history" (Gormley, p. 422). After his rejection by the full Senate, Bork resigned from the Circuit Court of Appeals for the District of Columbia and "became a resident scholar at the American Enterprise Institute," a conservative think tank (Hall, 1992, p. 79).

<sup>124</sup> The abbreviations B.C.E. and C.E. will be used to denote the time periods "Before the Common Era" and "Common Era" instead of the religious abbreviations B.C. and A.D. used prior to the end of the Twentieth Century C.E. to denote the years "Before Christ" and "Anno Domini" (Latin, meaning "The year of our Lord"). In quotations used throughout the paper, however, the form used by the cited author will be used.

<sup>125</sup> The states, listed in alphabetical order, that enacted their own civil rights statutes were (328 U.S. 373, 382, n. 24):

California	Iowa	Nebraska	Pennsylvania
Colorado	Kansas	New Jersey	Rhode Island

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Connecticut	Massachusetts	New York	Washington
Illinois	Michigan	Ohio	Wisconsin
Indiana	Minnesota		

- <sup>126</sup> The states whose attorneys general submitted briefs in support of Arkansas' discriminatory statute are listed in alphabetical order by column below. They may be found listed in the Court's opinion, 313 U.S. 80, 88.

Arkansas	Georgia	Mississippi	Texas
Alabama	Kentucky	Tennessee	Virginia
Florida	Louisiana		

- <sup>127</sup> For further information about Charles Hamilton Houston and his role as the architect of the NAACP's legal strategy, see the following pages of this manuscript: pp. 250-252, 257, 805, 811, 813, and Appendix O, pp. 1155-1157.
- <sup>128</sup> The 6-2 vote occurred because the Court was missing one of its justices. The Court was short-handed as the result of Justice Benjamin Cardozo's death on July 9, 1938 (Hall, 1992, p. 986). The case was argued November 9, 1938, and the opinion was delivered on December 12, 1938 (305 U.S. 337, 337). Felix Frankfurter was not sworn in as justice to fill the seat formerly held by Cardozo until January 30, 1939 (Hall, 1992, p. 986). Justice McReynolds wrote a separate dissenting opinion, which was joined by Justice Butler (305 U.S. 337, 353-354).
- <sup>129</sup> *University of Maryland v. Murray*, which began as *Murray v. The University of Maryland*, was a case referred to Houston by Thurgood Marshall, who, at the time, "was practicing in his hometown of Baltimore" and had "flawlessly laid" the "groundwork" for the case (McNeil, p. 138). Just one year shy of twenty years later, the roles would be somewhat reversed – Thurgood Marshall would triumph in *Brown v. Board of Education* on the strength of the strategic groundwork laid by Charles Hamilton Houston.
- <sup>130</sup> The two cases were both initiated against the same defendant, Sheriff Hopkins, for imprisonment following conviction for violation of a city ordinance: *Yick Wo v. Hopkins* and *Wo Lee v. Hopkins*. After imprisonment, the two laundry operators selected different appeal processes, due to a time differential in their convictions. Yick Wo appealed to the California Supreme Court for a writ of *habeas corpus* and was denied, whereupon Wo Lee, seeing that an appeal through the state system would be futile, applied for his writ of *habeas corpus* to the federal circuit court for California. Wo Lee did obtain a fairer hearing in federal court, but in spite of the Circuit Court Judge's opinion that the case represented violations "of the provisions of the Fourteenth Amendment to the National Constitution, and of the treaty between the United States and China," he deferred "to the decision of the Supreme Court of California in the case of Yick Wo, and contrary to his own opinion as thus expressed, the circuit judge discharged the writ and remanded the prisoner" (p. 363).
- <sup>131</sup> The legal status being referred to in the passage included these aspects of life: "[T]he husband alone controlled any property held in common; a wife could not sue in court, sell or mortgage her own property, or contract a debt without her husband's consent" (Censer & Hunt, p. 147).

- <sup>132</sup> Although the two treaties negotiated with the Six Nations and with the Wyandot et al were the first treaties laid before the Senate, neither of the two treaties was the first treaty ratified by the Senate. As detailed by Professor Hayden, the Consular Convention with France was the first treaty to which the Senate formally “gave its advice and consent” (Hayden, p. 4). President Washington first submitted this treaty to the Senate on June 11, 1789 (Sen. Exec. J., p. 5). After detailed examination of the extent to which the various parties involved in negotiating the final product followed the original instructions issued by the Continental Congress in 1782, and after considering the question of whether or not it was necessary for the Senate to ratify the agreement, on July 1, 1789, the Senate “unanimously consented to the [Consular] convention and advised the President to ratify it” (Hayden, p. 6; Sen. Exec. J., p. 9).

Hayden noted that in acting to ratify the Consular Convention with France,

the government of the United States had acted in accordance with the principle of international law, that except under extraordinary circumstances a nation was bound to ratify any agreement which it had instructed its representative to make. (Hayden, p. 9).

This is the decision to which President Washington referred in his message of September 17th to the Senate regarding the treaties negotiated at Fort Harmar.

- <sup>133</sup> A Professor of History at Duquesne University, participating in a session, “Law, Morality, and the Marshall Court,” at a meeting of the Organization of American Historians meeting on April 19, 1968, noted that the date on which the Court delivered its opinion in *Worcester v. Georgia* was March 3, 1832 (Burke, p. 500, n., 525). This would tend to validate Prucha’s reported date for the opinion. Bass also reported March 3, 1832, as the date of the Court’s opinion (Bass, p. 154).
- <sup>134</sup> Following the Court’s decision, President Jackson was alleged to have remarked, “John Marshall has made his decision; now let him enforce it” (Burke, p. 525; Debo, p. 122). Debo commented, “Whether or not the President used the words ascribed to him . . . , he ignored the court ruling and advised the Georgia officials to continue their persecution of the Cherokees” (Debo, p. 122). Burke commented, “Most historians . . . echoed these cries [of the anti-Jackson press following the *Worcester* decision]” accusing the President of allowing “Georgia to defy federal laws, treaties, and the decision of the Supreme Court” (Burke, p. 524). According to Burke’s analysis, most historians ended “their discussion of the *Worcester* case with the quote [attributed to Jackson]” (Burke, pp. 524-525). Burke continued:

While most [historians] admit that they cannot prove what Jackson said, none seems to doubt that he thought it and acted on it. The impression left by these discussions is that Jackson ignored his constitutional duty to enforce the Court decree. (Burke, p. 525)

While acknowledging that the alleged quote reflected Jackson’s views, both Prucha and Burke detailed factual problems with the conclusion that the President ignored his

constitutional duty in enforcing the Supreme Court's ruling. According to their analysis, even if Jackson had agreed with the Court's ruling (which he didn't), a combination of shortcomings and loopholes in the existing law of the period made federal enforcement of the Court's ruling both impracticable and impossible. According to Prucha:

United States marshals could not be sent to free the prisoners until the state judge had refused formally to comply with the order. But Georgia completely ignored the court's proceedings, and no written refusal was forthcoming. Anyway, the Supreme Court adjourned before it could report Georgia's failure to conform. Nor was there any other procedure that Jackson could adopt, even if he had wanted to. He himself declared that "the decision of the supreme court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate." (Prucha, 1984, 1986, p. 77)

Burke filled in more details regarding "the deficiencies in federal laws" by relying upon William Wirt's analysis of the enforcement difficulties (Burke, p. 525). Professor Burke began by summarizing Wirt's legal conclusions: "William Wirt, Worcester's own attorney, doubted that the Court decree could be enforced even in 1833, or that the Court could do anything for the missionaries" (Burke, p. 525). Responding to a fellow attorney's suggestion that the Supreme Court issue a writ of habeas corpus when the state court refused to execute the Court's decree, Wirt observed that such a procedure was not authorized by the Judiciary Act of 1789 which "allowed federal judges and courts to issue such writs only when prisoners were held under federal authority" (Burke, p. 526). Since Worcester and Butler were imprisoned by the State of Georgia, such a writ to free prisoners held under state authority could not automatically be issued. The Judiciary Act of 1789 and the course of action taken by Georgia presented yet another problem. According to Burke:

Though the Judiciary Act permitted the Court, when a case had once been remanded without effect, to proceed to a final decision and award execution, this action required a written record of the state court's refusal to carry out the first decree. Since the Georgia court never put its refusal in writing the Supreme Court could not have awarded execution in its next Term. (Burke, p. 526)

Based upon his analysis of the then current defects in the law, Wirt "recommended a new law and a series of amendments to cure the defects that this case had revealed in the judicial processes" (Burke, p. 526). Wirt's recommendations centered on three changes that needed to be made:

- new legislation regarding habeas corpus;
- an amendment to the Judiciary Act of 1789; and
- an amendment of the Militia Act of 1795.



First, new legislation would authorize “all federal judges to issue writs of habeas corpus to free persons held under state authority for violating a law that had been declared unconstitutional by the Supreme Court” (Burke, p. 526). Second, amending § 25 of the Judiciary Act of 1789 would “permit the Supreme Court to execute immediately its own sentence in a case where the state court seemed likely to resist” (Burke, p. 526). Third, the then current Militia Act “merely authorized the President to call out the militia to execute the laws of the Union” (Burke, p. 526). Despite his conviction that the Militia Act of 1795 already authorized presidential action in the current *Worcester* case, Wirt “wanted Congress to amend it to ‘require’ him to act” (Burke, p. 526).

Meanwhile, Worcester and Butler languished in a Georgia prison, having been sentenced to “four years of hard labor in the penitentiary” (Bass, p. 137). The political scene also shifted by the time the Court reconvened in January 1833. Jackson had been re-elected and the nullification crisis between South Carolina and the United States created the need for a “united front against the nullifiers” (Burke, p. 530). Acting behind the scenes William Wirt and Daniel Webster “advised the Cherokees not to renew the contest in the Supreme Court” because of the nullification crisis (Burke, p. 530). Wirt and Sergeant, who had represented the two missionaries, “begged them [Wirt & Butler] to drop [their] case for the same reasons” (Burke, p. 530). At the same time, “prominent Jacksonians ... pleaded with Governor Lumpkin of Georgia [on behalf of President Jackson] to pardon Worcester and Butler on the grounds that it would remove the pretext for bringing together Georgia and South Carolina on nullification” (Burke, p. 530). Simultaneously, the American Board of Commissioners for Missionaries, with whom Worcester and Butler were affiliated and who had hired Wirt to represent the two missionaries in *Worcester v. Georgia*, worked to convince the two reluctant missionaries to accept Governor Lumpkin’s pardon releasing them from prison (Prucha, 1984, 1986, pp. 76-77). Finally, on January 14, 1833, the two missionaries were released from prison based on orders the prison commandant received (Bass, p. 159). According to a researcher and professor at the University of Oklahoma, “The Governor sent them no written discharge, but issued his proclamation, stating that they [the two missionaries] had appealed to the magnanimity of the State, and had been set at liberty” (Bass, p. 159).

Although the second of the Cherokee cases had revealed the deficiencies of the Judiciary Act of 1789, it took the nullification crisis and the “need to defend the Constitution and the Union” to effect the needed changes in the law that had been defeated “for years” (Burke, p. 531). Professor Burke observed, “[I]t was not the missionary cause but the nullification controversy that turned Wirt’s hopes [for amending the Judiciary Act] into reality” (Burke, p. 531). He continued:

The Force Act of 1833 [the revision of the Judiciary Act of 1789] reads more like the revisions recommended by Wirt in April of 1832 [immediately following the *Worcester* decision] than those suggested by Jackson in his message to Congress in January of 1833. In fact Daniel Webster felt obligated to deny that “there was the slightest reference to the Georgia case in my own mind, or ever, as far as I know, in that of any other gentleman, in preparing and passing the bill for the better

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collection of revenue. It is true that some of the provisions of the bill ought, in my judgment, to be permanent.” (Burke, p. 531)

Regarding Webster’s denial of *Worcester*’s influence, one is reminded of the line from Shakespeare’s *Hamlet*, “The lady doth protest too much, methinks” (Act III, Scene 2, Line 239).

Some 160 years later in November of 1992, the State of Georgia formally acknowledged that it made a mistake in jailing “two missionaries for fighting its seizure of Cherokee land” (Associated Press, 1992; hereafter, AP, 1992). In its formal pardon of the two missionaries, Georgia called “the incident ‘a stain on the history of criminal justice in Georgia’ and acknowledge[d] usurping Cherokee sovereignty and ignoring the Supreme Court” (AP, 1992). While Georgia’s action represented repentance, no acts of either penance or restitution accompanied the gesture. The action merely acknowledged Georgia’s public awareness and acceptance of history’s judgment. And, while it publicly acknowledged Georgia’s wrongdoing to the general public, no mention was made that the State of Georgia issued a direct formal apology and request for forgiveness to either of the two federally recognized tribal governments whose members’ ancestors suffered at the hands of Georgia – the Cherokee Nation, based in Tahlequah, Oklahoma, or the Eastern Band of Cherokee Indians, based in Cherokee, North Carolina (see the tribal websites, [www.cherokee.org/Government/Default.aspx](http://www.cherokee.org/Government/Default.aspx) and [www.cherokeesmokies.com/about\\_cherokee.html](http://www.cherokeesmokies.com/about_cherokee.html) respectively). While Georgia admitted “usurping” Cherokee sovereignty, apparently it couldn’t bring itself to acknowledge the then-current sovereign governments of the Cherokee.

- 135 The official title, taken from the title page, is *Reports of Cases At Law and In Equity, Argued and Determined in the Supreme Court of Alabama*. The compilers of the Alabama Supreme Court Reports are listed as George N. Stewart and Benjamin F. Porter. It was originally published in 1836 at Tuscaloosa by Marmaduke J. Slade. When originally published, Stewart had resigned as the official reporter for the Alabama high court. His successor, Porter, made an arrangement with Stewart for the reports of the January and July terms of 1831 as well as part of the January term of 1832 to be published, using both their names as the reporters. The foregoing is explained in a note on an unnumbered page following the title page of the cited volume.
- 136 The two choices presented by the Alabama Chief Justice as the *only alternatives available* constitute a false position in that it ignored the pathway taken by the Marshall Court in the two Cherokee cases previously discussed.
- 137 The concept was originally developed by Friedrich Ratzel, a German geographer who lived from 1844-1904. Ratzel developed *lebensraum* as a concept that related “human groups to the spatial units” in which they lived (Friedrich Ratzel, ¶ 1). Ratzel’s “essay, ‘Lebensraum,’ [was] often cited as a starting point in geopolitics,” and served as a model “study in biogeography” (Friedrich Ratzel, ¶ 4). Following World War I, “the subsequent misuse of the *Lebensraum* concept by the Nazi regime in Germany was largely based on the interpretation of Ratzel’s concept by the Swedish political scientist Rudolf Kjellén” (Friedrich Ratzel, ¶ 1).

“Anti-Semitism and notions of German racial superiority were at the core of [the] ideology” promoted by Hitler in *Mein Kampf*, translated as “My Struggle” (Germany-The Third Reich-The Nazi Revolution [hereafter cited as “Nazi Revolution”], ¶’s 2 & 3). As Hitler envisioned the future:

Racially superior Germans were to be gathered into a tightly knit *Volkgemeinschaft*, or racial community, in which divisions of party and class would be transcended in a spirit of racial harmony, a harmony that would necessarily exclude people of inferior blood. (Nazi Revolution, ¶ 3)

In Hitler’s view, “the German *Volk* could never achieve their destiny without *Lebensraum* (“living space”) to support a vastly increased German population and form the basis for world power” (International Relations-Origins of WW II-Rise of Hitler and Fall of Versailles-Failure of the German Republic [hereafter cited as “Failure of the German Republic”], ¶ 5). According to Hitler, *Lebensraum*

was to be found in the Ukraine and intermediate lands of eastern Europe. This “heartland” of the Eurasian continent ... was especially suited for conquest since it was occupied, in Hitler’s mind, by Slavic *Untermenschen* (subhumans) [literally, less than, or below the status of men] and ruled from the centre of the Jewish-Bolshevik conspiracy in Moscow. (Failure of the German Republic, ¶ 5)

<sup>138</sup> Prucha comprehensively detailed the basic problems needing to be addressed by governmental policy immediately after the Revolution. Besides the need to establish peace with the tribes who had allied themselves with the British during the Revolution, other problems requiring attention were:

- determining the precise authority of the states and of the national government in managing Indian affairs,
- extinguishing in an orderly way the Indian title to the land so that the expanding settlements might find unencumbered room,
- restraining aggressive frontiersmen from encroaching upon country still claimed by the Indians,
- regulating the contacts between the two races that grew out of trade,
- providing adequate means to protect the rights of the red man, and
- fulfilling the responsibility that the Christian whites had to aid the savage pagans along the path toward civilization. (Prucha, 1962, pp. 1-2) (List formatting as bulleted points added)

Based on his extensive study, Prucha further concluded that by the 1830’s, the United States “had determined a set of principles which became the standard base lines of American policy” (Prucha, 1962, p. 2). Prucha identified the “fundamental elements of the federal program” as follows:

- 1) Protection of Indian rights to their land by setting definite boundaries for the Indian Country, restricting the whites from entering the area except under certain controls, and removing illegal intruders.
- 2) Control of the disposition of Indian lands by denying the right of private individuals or local governments to acquire land from the Indians by purchase or by any other means.
- 3) Regulation of the Indian trade by determining the conditions under which individuals might engage in the trade, prohibiting certain classes of traders, and actually entering into the trade itself.
- 4) Control of the liquor traffic by regulating the flow of intoxicating liquor into the Indian Country and then prohibiting it altogether.
- 5) Provision for the punishment of crimes committed by members of one race against the other and compensation for damages suffered by one group at the hands of the other, in order to remove the occasions for private retaliation which led to frontier hostilities.
- 6) Promotion of civilization and education among the Indians, in the hope that they might be absorbed into the general stream of American society. (Prucha, 1962, p. 2)

<sup>139</sup> An eminent historian aptly characterized the situation when he observed, “Regardless of the century, the reactions of a frontiersman to the sight of good arable land in the possession of an Indian were as easy to predict as the reflexes of Pavlov’s dog” (Hagan, p. 44). An astute Indian agent serving in the Mississippi Territory in 1809 “witnessed a drive of white settlers into Chickasaw lands north of the Tennessee River in what is now the state of Alabama” (Prucha, 1962, p. 159). In his report to the Secretary of War, the agent described the situation:

These intruders are always well armed, some of them shrewd and of desperate character, have nothing to lose and hold barbarous sentiments towards Indians. They see extensive tracts of forest exceedingly disproportioned to the present or expected population of the tribes who hold them. They take hold of these lands, some of them in hopes the land will be purchased, when they will plead a right of preemption, making a merit of their crimes. With these people remonstrance has no effect; nothing but force can prevent their violation of Indian rights. (Prucha, 1962, p. 160)

<sup>140</sup> Library of Congress, Omaha, Item 3, Nebraska [Homepage, select “Omaha” from the list of tribes, select Item # 3 from the list of items presented, click on “Nebraska” at bottom of page for Item #20].

<sup>141</sup> In 1933 Cohen (working in private practice in New York City and teaching classes at what later became the Rutgers Law School, at the New School for Social Research, and an additional course in legislative drafting at Yale Law School) was drafted by the Interior Department’s Solicitor to serve as the Assistant Solicitor for a one-year term in order

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to help draft basic legislation which would transfer to Indian tribes and individual Indians greater authority over their economic and political affairs. The act, originally called The Wheeler-Howard Act, later became known as the Indian Reorganization Act of 1934. (Felix S. Cohen, p. 347).

The request for one year turned into fourteen years of government service. In 1939 Cohen was loaned by the Interior Department to the Justice Department (again for one year) to serve as a Special Assistant to the Attorney General in order to head-up the “Indian Law Survey of the Department of Justice” (Felix S. Cohen, p. 348).

With the assistance of a colleague and friend of longstanding..., he compiled a 46-volume collection of Federal laws and treaties, and on the basis of this special study prepared a *Handbook of Federal Indian Law* which has become a standard source book in Indian law. (Felix S. Cohen, p. 348)

Cohen had the advantage of a unique and prodigious education. His father had a Ph.D. in philosophy and taught mathematics at City College in New York City. His mother gave up her job of teaching school and devoted herself to her first-born son for the first eight years of his life. At age eight he entered elementary school in Yonkers from which he graduated four years later. After attending Yonkers High School for one year, he transferred to a high school in New York in order to take advantage of a unique “seven-year educational system coordinated with City College” (Felix S. Cohen, p. 346). Six years later he “graduated from the College *magna cum laude*, just before his nineteenth birthday” (Felix S. Cohen, p. 346). After being awarded

a fellowship at the Harvard Graduate School, he spent the next two years at Cambridge, majoring in philosophy but spending many hours reading in law, political science, anthropology, and auditing the classes of professors outside the Philosophy Department for whom Harvard was also justly famous – Roscoe Pound, Felix Frankfurter... (Felix S. Cohen, p. 347)

Receiving his M.A. in philosophy in 1927, Frankfurter completed his “residence for a Ph.D. in 1928 on the Henry Bromfield Rogers Fellowship in Ethics and Jurisprudence” (Felix S. Cohen, p. 347). That fall (1928) Cohen entered the Columbia Law School. During the law school’s mid-year break, Cohen successfully completed “the comprehensive examination in philosophy at Harvard” (Felix S. Cohen, p. 347). At age 22 Cohen was awarded the Ph.D. in philosophy by Harvard and two years later received his LL.B. from Columbia Law School in 1931, having served as the “book review and legislation editor of the *Columbia Law Review* from 1929 to 1931” (Felix S. Cohen, p. 347). Cohen brought the full depth and breadth of his education to bear on his work at the Interior Department and the Department of Justice. His *Handbook of Federal Indian Law* is a work of prodigious scholarship and analysis.

Just how prestigious and authoritative Cohen's *Handbook of Federal Indian Law* is considered by those knowledgeable in the field of Indian law can be seen through consideration of the federal government's actions towards it in the 1950's when the U.S. Government embarked on "a policy of terminating all tribes and ending Federal services to Indians" (Bennett & Hart, p. v). Cohen's work ran directly counter to the government's new Indian policy. Just how is explained by the Director of the American Indian Law Center and a professor of law, both at the University of New Mexico:

Based on his painstaking studies and drawn from his rich background in law, philosophy, anthropology, and international affairs, it [the *Handbook of Federal Indian Law*] presented legal and moral arguments demonstrating that the American Indian was possessed of certain rights, among them self-governance and self-determination. (Bennett & Hart, p. v)

The Department of the Interior's response was to "rewrite Cohen's book and discredit the original under the guise of a revision" (Bennett & Hart, p. v). Since Cohen had died in 1953, he could not object. As a result the so-called revised version of Cohen's landmark work was issued in 1958 by the Government Printing Office. The purpose of the revision was baldly stated in the introduction to the 1958 edition: it was rewritten "for the purpose of foreclosing, if possible, further uncritical use of the earlier edition by judges, lawyers, and laymen" (Bennett & Hart, pp. v-vi). The new theme of the "revised" version was that "the Federal Government's power over Indian Affairs is plenary" (Bennett & Hart, p. vi). In other words, the federal government can do whatsoever it desires in unlimited fashion. It took over a decade and multiple congressional hearings to discredit the Termination Policy of Eisenhower's Republican administration. The major point is this: the 1958 edition of Cohen's *Handbook of Federal Indian Law* is not Cohen's work, despite the title page or the card catalog listing in any library.

<sup>142</sup> Cohen, 1942/1971, p. 153.

<sup>143</sup> Kappler, v. II, p. 140.

<sup>144</sup> Library of Congress, Delaware, Item 20, Kansas 2 [Homepage, select "Delaware" from the list of tribes, select Item # 20 from the list of items presented, click on "Kansas 2" at bottom of page for Item #20].

<sup>145</sup> Cohen, 1942/1971, p. 153, n. 11.

<sup>146</sup> Library of Congress, Menomini [sic], Item 3, Wisconsin 1 [Homepage, select "Menomini" from the list of tribes, select Item # 3 from the list of items presented, click on "Wisconsin 1" at bottom of page for Item #20].

<sup>147</sup> Library of Congress, Stockbridge, Item 1, Wisconsin 2 [Homepage, select "Stockbridge" from the list of tribes, select Item # 1 from the list of items presented, click on "Wisconsin 2" at bottom of page for Item #1].

<sup>148</sup> 112 U.S. 94, 119.

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- <sup>149</sup> The case was previously cited in at least two different ways. Cohen (1942) used the citation employed in this paper for *McKay v. Campbell* with the difference being the use of the case number, i.e., “*McKay v. Campbell*, 16 Fed. Cas. No. 8840 (Cohen, 1942/1971, p. 155, n. 34). The Supreme Court (1884) in *Elk v. Wilkins* cited it as 2 Sawyer , 118 (See 112 U.S. 94, 109). L.S.B. Sawyer, Esq. is listed as the reporter for the case (16 Fed. Cas. 161, n. 1) I found the case on page 161 in the 16th volume of the Federal Case series, so I used the modern legal format to cite the case. The Drake Law Library did not contain any of Sawyers reports, but did have the Federal Case series, whose formal title is “The Federal Cases, Comprising Cases Argued and Determined in the Circuit and District Courts of the United States: From the Earliest Times to the Beginning of the Federal Reporter, Arranged Alphabetically by the Titles of the Cases, and Numbered Consecutively” (16 Fed. Cas., Title Page).
- <sup>150</sup> Map retrieved July 28, 2009, from the World Sites Atlas web site:  
<http://www.sitesatlas.com/Flash/USCan/static/SDFF.htm>
- <sup>151</sup> Library of Congress, Ponka [sic], Item 1, Dakota 1 [Homepage, select “Ponka” from the list of tribes, select Item #1 from the list of items presented, click on “Dakota 1” at bottom of page for Item #1].
- <sup>152</sup> The location of this map derives from the Quapaw Treaty of 1833 whereby the Quapaw removed from Arkansas to the Indian Territory (Royce, pp. 748-749): Library of Congress, Quapaw, Item 3, Indian Territory 2 [Homepage, select “Quapaw” from the list of tribes, select Item #3 from the list of items presented, click on “Indian Territory 2” at bottom of page for Item #3].
- <sup>153</sup> Library of Congress, Ponka [sic], Item 5, Indian Territory 3 [Homepage, select “Ponka” from the list of tribes, select Item #5 from the list of items presented, click on “Indian Territory 3” at bottom of page for Item #5].
- <sup>154</sup> The cases are *Hamdi v. Rumsfeld* (2004), *Rasul v. Bush* (2004), *Hamdan v. Rumsfeld* (2006), and *Boumediene v. Bush* (2008). Professor Ronald Dworkin discussed the cases and their significance in an article published in *The New York Review of Books* on August 14, 2008. Anthony Lewis, who won his second Pulitzer Prize for his reporting on the U.S. Supreme Court as a reporter and columnist for *The New York Times*, also wrote about the cases. His citations are taken from his article in *The New York Review of Books* that appeared on September 25, 2008. According to Lewis, *Rasul v. Bush* (2004) was decided by a 6-3 majority, *Hamdan v. Rumsfeld* (2006) was decided by a 5-3 majority, and *Boumediene v. Bush* (2008) was decided by a slim 5-4 margin (Lewis, 2008, p. 46). Lewis focused on these three cases because they were unified by the following theme: “Three times in the last four years the Supreme Court has rejected the Bush administration’s legal defenses of its program for detention of alleged ‘enemy combatants’” (Lewis, 2008, p. 46). U.S. Senator Arlen Specter also discussed the same cases in an article published in the same journal, *The New York Review of Books*, on May 14, 2009. Dworkin described the importance of *Boumediene v. Bush*:

The Court held by a 5-4 vote that aliens detained as enemy combatants in Guantánamo have a constitutional right to challenge their detention in

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American courts. The decision frees none of them, some of whom have been held without trial for six years, but it makes it possible for them to argue to a federal district court judge that the administration has no factual or legal ground for imprisoning them.... American law has never before recognized that aliens imprisoned by the United States abroad have such rights. (Dworkin, 2008, p. 18)

Dworkin anchored the decision in Anglo-American law by noting that “the principle the Court vindicated is simple and clear. Since before Magna Carta, Anglo-American law has insisted that anyone imprisoned has the right to require his jailor to show a justification in a court of law” (Dworkin, 2008, p. 18). The professor of law also described the actions taken by the Bush administration that violated basic precepts of habeas corpus. Bush administration arguments echoed a portion of the argument used by the U.S government in 1879 against Standing Bear’s petition for a writ of habeas corpus – noncitizens have no legal standing to request such a writ:

The Bush administration, as part of its so-called “war on terror,” created a unique category of prisoners who it claims have no such right [to a writ of habeas corpus] because they are aliens, not citizens, and because they are held not in an American prison but in foreign territory. (Dworkin, 2008, p. 18)

Senator Specter couched his references to *Boumediene v. Bush* in terms of what he perceived to be a threat to the traditional notion of the separation of powers in American government. In Senator Specter’s view:

In the seven and a half years since September 11, the United States has witnessed one of the greatest expansions of executive authority in its history, at the expense of the constitutionally mandated separation of powers. President Obama, as only the third sitting senator to be elected president in American history, and the first since John F. Kennedy, may be more likely to respect the separation of powers than President Bush was. But rather than put my faith in any president to restrain the executive branch, I intend to take several concrete steps, which I hope the new president will support. (Specter, p. 48)

While Senator Specter’s views represent a viewpoint from within the federal government, they are corroborated by outside sources as well. Consider the following assessment of the Bush-Cheney Administration’s use of “fear flowing from the attacks on September 11 to institute a policy of deliberate cruelty that would have been unthinkable on September 10” by an independent journalist with specialized knowledge of the situation gained from arduous research and study:

President Bush, Vice President Cheney, and a small handful of trusted advisers sought and obtained dubious legal opinions enabling them to



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circumvent American laws and traditions. In the name of protecting national security, the executive branch sanctioned coerced confessions, extrajudicial detention, and other violations of individuals' liberties that had been prohibited since the country's founding. They turned the Justice Department's Office of Legal Counsel into a political instrument, *which they used to expand their own executive power at the expense of long-standing checks and balances*. (Emphasis added) (Mayer, p. 41)

Viewing *Boumediene v. Bush* as an effort by the Supreme Court "to beat back the encroachment of executive power," Senator Specter expressed that he "was frustrated that Congress had left the task of reining in the executive to slow-paced and incomplete judicial review" (Specter, p. 50). He explained:

While the *Boumediene* decision ensured habeas rights for detainees, it took seven years; and even then the Court almost failed to take on the case. All along, the Court's rulings [in *Hamdi v. Rumsfeld* and in *Rasul v. Bush*] were piecemeal and avoided taking strong stands on controversial constitutional questions. The result was a protracted process that delayed justice for detainees and left important areas of the constitutional law murky. (Specter, p. 50)

Senator Specter presented further information in support of his contention that the "Court almost failed to take on the case" (Specter, p. 50). According to the senator:

Indeed the Supreme Court actually denied *Boumediene*'s initial petition for review on April 2, 2007. Then, on June 29, in a highly unusual move, the Court reconsidered and agreed to hear the case. The justices gave no reason for the reversal, but some speculate that they were moved by intervening disclosures concerning the military commissions. In particular, a military officer and lawyer who had been involved in overseeing the tribunals said that the process was flawed and that prosecutors had been pressured to label detainees as enemy combatants. (Specter, p. 50)

Anthony Lewis pointed to a ruling in June of 2008 by a "three-judge panel of the United States Court of Appeals for the District of Columbia" that may have impacted the Supreme Court's surprising reversal of its earlier refusal to consider *Boumediene et al.*'s petition (Lewis, 2008, p. 47). The case involved "Huzaifa Parhat, one of a number of Uighur Muslims from China [incarcerated at] Guantánamo" who had been "captured in Pakistan in the fall of 2001" (Lewis, 2008, p. 47). Citing the case as "[a] striking example of the importance of having courts check official decisions that someone is an 'enemy combatant,'" Lewis reported that the Court of Appeals found "that there was no persuasive evidence to support the government's labeling of him [Parhat] as an enemy combatant" (Lewis, 2008, p. 47). According to Lewis:

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The [three-judge] panel included the court's chief judge, David Sentelle, one of the most conservative federal judges in the country. Its opinion ridiculed the government argument, comparing it to the statement of a Lewis Carroll character: "I have said it thrice. What I tell you three times is true." (Lewis, 2008, p. 47)

The military commissions were a response by the Defense Department to the Court's ruling in *Hamdi v. Rumsfeld* whereby

an American citizen designated an enemy combatant nevertheless has a right, under the Constitution's due process clause, to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker. (Dworkin, 2008, p. 18).

The administration's response, "only a minimal interpretation of O'Connor's description of what due process required," was based partially on Justice Sandra Day O'Connor's plurality opinion in *Hamdi v. Rumsfeld* in which she "said that the administration might satisfy the [notice] requirement through appropriately constituted military tribunals that do not provide the procedures and protections of ordinary criminal courts" (Dworkin, 2008, p. 18). The "minimal interpretation" of O'Connor's description of due process by the Bush administration's military tribunals included the following:

Detainees were provided with special legal "representatives" appointed by the administration rather than lawyers of their choice. They were not allowed to confront government witnesses, and could call only those witnesses the government decided could be produced "reasonably." Hearsay evidence was allowed against them, and the government's factual claims were to be presumed correct unless rebutted. (Dworkin, 2008, p. 18)

On the same day that the Court decided *Hamdi v. Bush*, the Court also reached its decision in *Rasul v. Bush* wherein the Court ruled "that the Guantánamo detainees were entitled to bring a habeas corpus challenge to their detention in the federal district court for the District of Columbia" (Dworkin, 2008, p. 18). It was this ruling that "opened the way for Lakhdar Boumediene and thirty-six others held at Guantánamo to file habeas corpus petitions in federal courts challenging their detention" (Dworkin, 2008, p. 18).

However, after the petition was filed by Boumediene et al, Congress got into the act and "overturned the *Rasul* decision" with its enactment of the Detainee Treatment Act of 2005, an act which provided

that no court, justice, or judge shall have jurisdiction to hear or consider ... an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba... (Dworkin, 2008, p. 19)

On June 29, 2006, the Supreme Court ruled on a challenge to the legitimacy of the military commission trials.

[T]he Court announced in *Hamdan v. Rumsfeld* that the president could not conduct military commission trials under procedures that had not been authorized by Congress and that failed to satisfy the obligations of the Geneva Conventions' Common Article III and the Uniform Code of Military Justice. (Specter, p. 50)

The Court also held in *Hamdan v. Rumsfeld* that the provisions of the Detainee Treatment Act prohibiting detainees at Guantánamo Bay from filing for habeas corpus were "not intended to apply to petitioners who had already filed habeas corpus applications when the DTA [Detainee Treatment Act] was enacted" (Dworkin, 2008, pp. 19).

Congress once again responded to the Court's ruling with another legislative act, the Military Commissions Act of 2006, in which it stated "that the DTA was intended to apply retroactively," thus prohibiting the *Boumediene et al* petition for a writ of habeas corpus. Senator Specter supplied the reasoning behind the legislation, which was a view "that foreign terrorist suspects did not have the same rights as others in US custody" (Specter, p. 50). Specter reported that he "offered an amendment that would have guaranteed habeas corpus for detainees," arguing that he "was 'trying to establish ... a course of judicial procedure' to determine whether the accuses were in fact enemy combatants" (Specter, p. 50). According to Specter:

I pointed out that my fight to preserve habeas rights was, in essence, a struggle to defend "the jurisdiction of the federal courts to maintain the rule of law." I concluded with a plea for the Senate not to deny "the habeas corpus right which would take us back some 900 years and deny the fundamental principle of the Magna Charta imposed on King John at Runnymede." Despite these entreaties, my amendment narrowly lost on a 48-51 vote. (Specter, p. 50)

As the name of the act suggests (the Military Commissions Act), Congress reinstated the military tribunals ("Combatant Status Review Tribunals" or CSRT's) under procedures it authorized that continued the limit of the right of appeal to the District of Columbia Circuit Court (Dworkin, 2008, p. 18 & p. 19, n. 7).

According to Dworkin, congressional maneuvering to thwart Supreme Court rulings eventually "forced the justices to face two new questions," both of which were addressed in *Boumediene v. Bush* (Dworkin, 2008, p. 19). This occurred because, as noted by Dworkin, Congress had forced the issue of habeas corpus up against the "suspension clause" of the Constitution, which even "Congress [could] not overrule" (Dworkin, 2008, p. 19). As described by Dworkin, the "suspension clause" of the Constitution provides "that Congress may suspend the writ of habeas corpus only during an invasion or a rebellion" (Dworkin, 2008, p. 19). Since no one had put forth the argument that the terrorist attacks of September

11, 2001, constituted either a rebellion or an invasion, the Supreme Court was faced with interpreting congressional limitations of habeas corpus in light of the Constitution's strictures regarding the abolition of habeas corpus. The two questions confronting the Court were described by Dworkin:

[1] Does the constitutional guarantee of habeas corpus apply to aliens imprisoned at Guantánamo outside the formal territory of the United States? [2] If so, is the scheme provided by Congress in the Detainee Treatment Act [of 2005] and the Military Commissions Act [of 2006] – military tribunals that could be followed by a limited appeal to the D.C. Circuit Court – an adequate substitute for the traditional writ?

Dworkin noted the Court's answer to both questions: "In *Boumediene*, Kennedy, for the five-justice majority, answered the first question yes and the second no, and he therefore declared the congressional scheme unconstitutional" (Dworkin, 2008, p. 19).

The response from the right side of the political spectrum was mixed, but a majority of the response "predicted in strident language that the decision would gravely damage the country's security" (Lewis, 2008, p. 46). Senator John McCain, "a survivor of torture as a prisoner in North Vietnam who was once a critic of the Bush detention practices," described as "wav[ing] the bloody shirt," declared that the Court's decision was "one of the worst decision in the history of the country" (Lewis, 2008, 46, 47). However, George Will, a conservative columnist, supported the Court's decision. In a column he wrote that blasted "Senator McCain for the ignorance of his comments on habeas corpus," Will wrote that "the Supreme Court's ruling only begins marking a boundary against government's otherwise boundless power to detain people indefinitely" (Lewis, 2008, p. 47). Will further noted:

No state power is more fearsome than the power to imprison. Hence the habeas right has been at the heart of the centuries-long struggle to constrain governments, a struggle in which the greatest event was the writing of America's Constitution, which limits Congress's power to revoke habeas corpus to periods of rebellion or invasion. (Will, p. A17)

One is reminded of the exchange that took place in *A Man For All Seasons* regarding the desire to circumvent the law in order to get at ones adversary, a play illustrating the tensions between a government of men versus a government of law:

Roper	So now you'd give the Devil benefit of law!
More	Yes. What would you do? Cut a great road through the law to get after the Devil?
Roper	I'd cut down every law in England to do that!
More	Oh? And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast – man's laws, not God's - and if you cut them down – and you're just the man to do it – d'you really think you could

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stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake. (Bolt, p. 66)

While the lower federal court judge in *United States ex rel. Standing Bear v. Crook* didn't address a constitutional issue as did the nation's highest court in *Boumediene v. Bush*, the effect was similar – the Court rejected executive arguments for arbitrary military power over noncitizens and upheld the right of habeas corpus, a cornerstone, we now see, in the long-traveled, arduously constructed, difficultly maintained road towards maintaining a government of laws as opposed to a government of men. Under a government of men, arbitrary whims & desires of those in power would prevail over notions of liberty and equality under the law. Perhaps it was a notion of this long and ancient battle that prompted Benjamin Franklin's reply in the story related below:

A lady asked Dr. [Benjamin] Franklin, "Well doctor, what have we got, a republic or a monarchy?" "A republic," replied the Doctor, "if you can keep it." - Papers of Dr. James McHenry, describing the scene as they left the Federal Convention of 1787 in Philadelphia. (Mayer, p. 41)

- <sup>155</sup> Vine Deloria, Jr., described as "a leading spokesman for Indians," after being educated by reservation schools on the Pine Ridge and Standing Rock Sioux Indian reservations, received a B.S. in science from Iowa State University, an MA in theology from the Lutheran school of Theology in Illinois, and his JD from the University of Colorado (Johnson, ¶ 13). He was a leading figure in the National Conference of American Indians from 1964 – 1967. Gifted with a "scathing, sardonic humor, which he was able to use on both sides of the Indian-white divide," Deloria "steadfastly worked to demythologize how white Americans thought of American Indians" (Johnson, ¶ 3). In a 1976 Op-Ed article he wrote for the New York Times, Deloria wrote:

We have brought the white man a long way in 500 years. From a childish search for mythical cities of gold and fountains of youth to the simple recognition that lands are essential for human existence. (Johnson, ¶ 5)

Deloria authored 21 books "about the Native American experience" during his lifetime (Johnson, ¶ 1). Deloria taught history at the University of Arizona from 1978-1990 before moving to the University of Colorado where he taught from 1990 until his retirement in 2000 (Deloria, Vine, Jr.; Johnson, ¶ 14). Deloria died Sunday, November 13, 2005 (Deloria, Vine, Jr.).

- <sup>156</sup> For those unfamiliar with his professional work, the following information about Ronald Dworkin was found in the "Contributors" section of the Contents page of the April 30, 2009 edition of *The New York Review of Books* (p. 3):

Ronald Dworkin is Frank Henry Sommer Professor of Law and Philosophy at NYU and Jeremy Bentham Professor of Law and

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Philosophy at University College London. His books include *Is Democracy Possible Here?*, *Justice in Robes*, *Sovereign Virtue: The Theory and Practice of Equality*, and *Freedom's Law*.

Information on his faculty web page at New York University also reveals the following:

He received BA degrees from both Harvard College and Oxford University, and an LLB from Harvard Law School and clerked for Judge Learned Hand. He was associated with a law firm in New York (Sullivan and Cromwell) and was a professor of law at Yale University Law School from 1962-1969. He has been Professor of Jurisprudence at Oxford and Fellow of University College since 1969. He has a joint appointment at Oxford and at NYU where he is a professor both in the Law School and the Philosophy Department. He is a Fellow of the British Academy and a member of the American Academy of Arts and Sciences. Professor Dworkin is the author of many articles in philosophical and legal journals as well as articles on legal and political topics in *The New York Review of Books*. (Retrieved 7-28-09 from: <http://philosophy.fas.nyu.edu/object/ronalddworkin>)

<sup>157</sup> Dworkin, p. 29.

<sup>158</sup> In a work focused upon the Indian Trade and Intercourse Acts from 1790 to 1834, Prucha discussed the origin and continuation of “crimes committed by one Indian against another” in “Indian Country:”

The provision of the act of 1817 that declared that laws providing punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States should be in force also in the Indian Country was continued [by the “act of 1834”], along with the proviso that these laws did not extend to crimes committed by one Indian against another. (Prucha, 1962, p. 268)

The intersection of legislation and treaties resulted in the following Court interpretation as described by Deloria:

Throughout most of the treaties the tribes had been given “free and undisturbed use” of their lands. In many previous cases this phrase had been interpreted to mean that the United States could not interfere with the domestic relations of the tribe when practiced according to custom. (Deloria, 1971, p. 153)

<sup>159</sup> Library of Congress, Hupa (S. Fork, Redwood, and Grouse Creek bands), California 2 [Homepage, select “Hupa (S. Fork, Redwood, and Grouse Creek bands)” from the list of tribes, click on “California 2” at bottom of page].

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- <sup>160</sup> Prucha described the hold that the so-called reformers had on the federal government's American Indian policy during the latter part of the nineteenth century. For those familiar with the right-wing fundamentalists' affiliation with the twenty-first century Bush administration, it seems eerily familiar. According to Prucha:

Protestant Christian reformers had dominated the formulation of Indian policy in the late nineteenth century, operating effectively through the Board of Indian Commissioners and such voluntary organizations as the Indian Rights Association and the Lake Mohonk Conference. They looked upon themselves as the guardians of the Indians and the watchdogs and arbiters of national Indian policy. They saw themselves, not unrealistically, as the effective force in moving the Indians into an individualized, Americanized society (which meant to them a Protestant Christian nation). (Prucha, 1984, 1986, p. 267)

- <sup>161</sup> Vliet, p. 158. Vliet, a professor of law at the University of Oklahoma, reviewed Kickingbird's and Ducheneaux's work, *A Hundred Million Acres*, for the law review journal (*American Indian Law Review*) published by the University of Oklahoma College of Law. According to Vliet:

Kirke Kickingbird, a Kiowa, is currently with the Institute for Development of Indian Law. He graduated from the College of Law of the University of Oklahoma. Karen Ducheneaux, a Cheyenne River Sioux, is now a staff writer for the American Indian Press Association. Both authors formerly were with the Bureau of Indian Affairs, and both left the agency to aid in the development of the Institute. Vine Deloria, Jr., [who wrote the book's introduction], a Standing Rock Sioux, is a former Executive Director of the National Congress of American Indians. He, too, is now with the Institute for Development of Indian Law and is a widely read author. (Vliet, p. 158)

- <sup>162</sup> Prucha, 1984, 1986, p. 227.

- <sup>163</sup> Prucha, 1984, 1986, p. 227.

- <sup>164</sup> Prucha, 1984, 1986, p. 227.

- <sup>165</sup> McDonnell, p. 121.

- <sup>166</sup> For those unfamiliar with land holdings on late twentieth-century Indian reservations, McDonnell provides an explanation showing how most Indian reservation land holdings came to resemble a giant checkerboard.

As Indians disposed of their allotments they were replaced by whites moving onto the reservation so that by 1934 a checkerboard pattern dominated maps of allotted reservations. While whites steadily consolidated their holdings into viable farming and grazing units by purchasing or leasing allotments, Indian lands became more divided.

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The Indian Reorganization Act of 1934 would try to reverse the checkerboard pattern and consolidate what was left of the Indian estate. (McDonnell, p. 121)

- <sup>167</sup> A 160-acre allotment at the time of its creation might have been a sustainable unit, depending upon topography, geography, and weather. However, the Dawes Act hadn't contemplated the complications arising from tribal customs and heirship.

Heirship policies so subdivided Indian lands among multiple owners that they were no longer economically viable units and the only way to get a return was to lease it. One 160-acre allotment made in 1887 would by 1985 pass to 312 heirs. The largest holding was four acres and the smallest was .0009 acres (the yearly income for the owner of this plot was less than one cent). (McDonnell, p. 121)

- <sup>168</sup> Entitled "An Act Granting citizenship to certain Indians," the specific language of the act referred to "every American Indian who served in the Military or Naval Establishments of the United States during the war against the Imperial German Government" (41 Stat. 350). The date it became official (November 6, 1919) is not the date it was submitted to the President (October 25, 1919) subsequent to being approved by the Senate and the House of Representatives (41 Stat. 350). President Wilson neither signed nor vetoed the bill, and, "not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution of the United States, [the Indian Citizenship Act] ha[d] become a law without his approval" (41 Stat. 350).

- <sup>169</sup> This writer lived and taught in the two Hunkpapa Lakota communities of Bullhead and Little Eagle, South Dakota, on the Standing Rock Sioux Indian Reservation from 1970 – 1980. The fact of the Hunkpapa locating on communities along the Grand River on the South Dakota side of Standing Rock in order to be a good distance away from the agency in Fort Yates, North Dakota, was a matter of common knowledge among the residents of both communities as it was their direct ancestors who were involved. The names of Hunkpapas mentioned in histories of the Hunkpapa during the period of Hunkpapa resistance to white incursions on their land in the nineteenth century, i.e., Smith (1975), Utley (1993), & Vestal (1932), are the names of families still residing on Standing Rock, e.g., Gray Eagle, Bear Ribs, Black Crow, Village Center, Red Tomahawk, Thunder Hawk, Circling Hawk, Red Bear, Otter Robe, Bear Shield, Bone Club, Bullhead, DeRockbraine, Elk Nation, Flying By, Grindstone, Higheagle, Long Feather, Kills [Pretty] Enemy, Old Bear, Red Bird, Little Dog, etc. The Grand River country was also ground upon which the Hunkpapa had previously lived and hunted. Finally, after returning from Canada and surrendering to the U.S., after touring "with the Allen and Cody shows [that] had shown him the seamy underside of the white world," Sitting Bull told missionary Mary Collins, "the farther my people keep away from the whites, the better I shall be satisfied" (Utley, p. 269).

The communities, Rock Creek and Running Antelope Settlements, were renamed by the Indian agent, Major James McLaughlin, following the assassination of Sitting Bull at his home on the Grand River (For the Running Antelope Settlement being renamed Little Eagle, see also Utley, p. 305). The names McLaughlin selected were the names of two of the Indian



police killed in the fight following the killing of Sitting Bull, Bullhead and Little Eagle. Before the end of the twentieth century, local citizens cast off the name of Bullhead and reinstated the original name, Rock Creek, to the name of both their local school and their tribal district on Standing Rock (See Standing Rock Sioux Tribe website, <http://www.standingrock.org/tribalGov/>; and the South Dakota Department of Education website, <http://doe.sd.gov/ofm/edudir/schooldata/results.asp?districtnumber=15302>).

It was also well known that Sitting Bull located his settlement on the Grand River near his birthplace, which also happened to be the place where he was killed by Indian police while being arrested in December 15, 1890 (See also Smith, pp. 98, 153-160; Utley, pp. 3, 22, 299-305; Vestal, pp. 3, 256, 290-300, 314).

<sup>170</sup> Personal photo of Doughboy Monument, Rock Creek, South Dakota.

<sup>171</sup> Personal Photo of inscription on Doughboy Monument, Rock Creek, South Dakota.

<sup>172</sup> The 1971 recordings of William Horncloud, an Oglala Lakota singer born on the Pine Ridge Sioux Indian Reservation contain sixteen songs which can be categorized as follows: two honoring songs, four dance songs, three love songs, the Sioux National Anthem & Victory Song, and four war songs (Horncloud, CD cover). Of the four war songs, one is a marching song of one of the Lakota warrior societies, one recalls a battle against the Crow, one describes a fight against the Pawnee, and the other one celebrated “the victory of the United States over the Germans in World War I that was amended to include the victory over the Germans in World War II (Horncloud, CD cover). The English lyrics are:

The enemy is crying.  
The Germans wanted a fight.  
And now they are crying. (Horncloud, CD cover)

The 1977 recordings of traditional Lakota songs by the Porcupine Singers from the Porcupine District of the Pine Ridge Sioux Indian Reservation contains ten songs recorded at a powwow on the Rosebud Sioux Indian Reservation. Besides dance and love songs, and besides the Lakota National Anthem and Veterans Song, the album featured songs celebrating the Lakota victory at the Little Big Horn, commemorating a victory of the Western Lakota over the Eastern Lakota who were scouting for the U.S. cavalry, celebrating the return “of a successful raiding party,” and a song, “World War I Veterans’ Song,” honoring Lakota patriotism for its ally, the United States. The lyrics in Lakota and English follow:

Lakota hoksila iya sica tamakoce k iota  
Iyacuca ekta wicaceyahe.  
The Lakota soldiers took the Germans’  
Land so they are still crying. (Porcupine Singers, CD cover)

Finally, the 1974 recordings of the Ho hwo sju Lakota Singers, a group of Minneconju Lakota from the Red Scaffold district of the Cheyenne River Sioux Indian Reservation further illustrate the importance of Lakota participation in World War I. In addition to three

dance songs, the Sioux National Anthem, an old-time honor song for a wounded warrior, a “Veterans Rabbit Song,” and a more modern song for the Lakota veterans who served in the U.S. armed forces, the album contains two songs honoring World War I veterans. The lyrics of the first song honoring Lakota veterans of World War I were explained by Steve Charging Eagle, one of the singers:

A veteran carries a small flag in, then he chooses a partner, and gives it to this lady. At a certain place in the song, this lady goes and gives the flag to another man, and this man has to get another partner, and it goes from there until everyone is out on the floor. Nobody can refuse this flag, because they have to honor this flag, and that’s how the words go in this song: (Ho hwo sju Lakota Singers, CD cover)

The lyrics (in English) of the Lakota language song are:

You have to honor the flag. So I did.  
Therefore this dance is mine. (Ho hwo sju Lakota Singers, CD cover)

<sup>173</sup> The Iroquois Confederacy was not the only tribal group to oppose the granting of U.S. citizenship to tribal members. The expert on American Indian law, Felix Cohen, noted that the “delegates [to petition Congress in 1887] of the Five Civilized Tribes opposed the grant of federal citizenship to their people because they feared it would terminate their tribal government” (Cohen, 1942/1971, p. 155). Cohen attributed this position on the part of the Five Civilized Tribes as being one of the reasons that the “Five Civilized Tribes were excluded from the General Allotment Act” (Cohen, 1942/1971, p. 155, n. 46).

<sup>174</sup> World Suffrage Timeline – Women and the Vote.

<sup>175</sup> Filler, 1977b, p. 322.

<sup>176</sup> Filler, 1977b, p. 322.

<sup>177</sup> Filler, 1977b, p. 322.

<sup>178</sup> Filler, 1977b, p. 322.

<sup>179</sup> It would be easy to find fault with the reporting done by Dallas if compared to subsequent reporters. However, such a comparison would ignore the historical context of our Court’s beginnings, and thus would leave unrecognized the fact that the country’s judicial history owes a debt of gratitude to Alexander J. Dallas for his initiative in undertaking such a vitally important task as that of compiling reports of the Court’s activity, which otherwise would have been known only by haphazard newspaper accounts, personal correspondence, and word of mouth. Initially the Court did not require written opinions (Hall, 1992, p. 215). Congress did not officially recognize the office of Supreme Court Reporter until 1816 and didn’t provide a salary for the position until passage of the Judiciary Act of 1817 (Hall, 1992, p. 727).

Described as “a journalist, editor, and future secretary of the treasury,” Dallas assumed the Court’s reportership as “purely an entrepreneurial venture” (Hall, 1992, pp. 727, 215). Prior to the Court’s arrival in Philadelphia from New York City in 1791, Dallas had already begun publishing reports of Pennsylvania court decisions “for private sale” (Hall, 1992, p. 727). Titling his reports “in the tradition of English nominative reports,” his first volume was titled “1 Dallas” (Hall, 1992, p. 727). This first volume, it should be noted, contained only state opinions for Pennsylvania; however, his second volume contained some U.S. Supreme Court decisions, which he continued publishing until the Court moved to Washington, D.C. in 1800 and “William Cranch assumed the reporter’s job” (Hall, 1992, p. 727). Interestingly, Cranch was the nephew of President John Adams, being the “son of Abigail Adams’s sister” (Hall, 1992, p. 207). One legal scholar described the situation confronting Dallas:

The execution of Dallas’s self-appointed task was marked, however, by delay, expense, omission, and questionable accuracy. In fairness, he faced formidable obstacles. Lack of government funding forced selective reporting, reflecting purchasers’ unwillingness to finance fuller reports. Likewise, because the Court had no requirement of written decisions and Dallas’s practice precluded constant attendance at its proceedings, he often relied on others’ notes. The results were uneven .... Barely half of the Court’s dispositions during its first decade were reported, and accounts of many cases ... contain matter clearly not the justices’ own. (Hall, 1992, p. 215)

Dallas himself, comparing his original aspiration with his actual accomplishment, wrote in 1800 upon the Court’s relocation to Washington, D.C., “I have found such miserable encouragement for my Reports that I have determined to call them all in, and devote them to the rats in the State-House” (Hall, 1992, p. 215).

<sup>180</sup> The citation, 2 U.S. (Dall.) 401, referred to activity taken during the February, 1792 term of the Court by which “the marshal had returned the writ served; and now, *Sergeant* moved for a *distringas*, to compel an appearance on the part of the state.” Following this statement by Dallas is an asterisked note, which appears to have been inserted later as it referred to a later action and also referenced a later case: “While, however, the court held the motion under advisement, it was voluntarily withdrawn, and the suit discontinued.(a)” [sic]. The referenced “(a)” stated, “But see s.c. *infra*, and *Grayson v. Virginia*, 3 Dall. 320.”

The next citation for *Oswald v. State of New York* occurred on the following page during the following August, 1792 term of the Court. 2 U.S. (Dall.) 402 directed “the marshal of New York district” to return the writ to New York officials and provided “that in case of a default, he do show cause therefore, by affidavit before one of the judges of the United States.”

The citation, 2 U.S. (Dall.) 415, referred to the activity taking place in the Court’s next term of February, 1793. It followed the activity that took place in the previous two terms of the Court, but preceded the activity asterisked in the February, 1792 report compiled by Dallas. At the February, 1793 term of the Court, the case was called, but no one appeared to represent the State of New York. The Court then issued the following order: “Unless the state appears by the first day of next term to the above suit, or show cause to the contrary,

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judgment will be entered by default against the state.(a)” [sic]. The referenced “(a)” noted: “See *ante*, p. 401; and also *Chisholm, executor v. Georgia, post*, p. 419; *Cutting, administrator, v. South Carolina*, and *Grayson v. Virginia*, 3 Dall. 320.”

- <sup>181</sup> The term, “bill in equity,” derived from the English legal system. According to one legal scholar, “By the fourteenth century, England possessed two distinct and somewhat rival court systems, known popularly as ‘law’ and ‘equity’ courts” (Hall, 1992, p. 430). According to the previous source, “Law courts were characterized by their development of the common law, use of juries, reliance on common-law pleading and the writ system, and a rigid formality in their approach to resolving legal conflicts” (Hall, 1992, p. 430). Equity courts, on the other hand, “adopted a more flexible approach to cases and provided for broad remedies” (Hall, 1992, p. 430). Instead of the common law approach limiting an injured party “to a recovery of money as compensation for injury or damage,” an injured person initiating a suit in equity court “could choose from an array of coercive remedies, including injunctions to require or prohibit conduct, to require the specific performance of a contract, or to order the division of jointly owned property” (Hall, 1992, p. 430). Thus the equity courts “provided a flexibility lacking in the law courts” (Hall, 1992, p. 430).

The court system in the United States “drew heavily on its English origins” (Hall, 1992, p. 430). Defining the nation’s judicial power in Article III, § 2 of the Constitution, the Framers declared, “The judicial Power shall extend to all Cases, **in Law and Equity**, arising under this Constitution, the Laws of the United States, and Treaties made...” (Emphasis added). By this statement, the nation’s federal courts were empowered “to provide all the remedies developed in England’s equity courts” (Hall, 1992, p. 431). Thus, “after the Revolutionary period all states provided for equity courts, either as separate bodies or unified with law courts” (Hall, 1992, p. 431).

- <sup>182</sup> For Cicero, nature, or natural law, had a different connotation than it does for the modern reader, who thinks of natural law as referring to scientific laws and processes. When Cicero used the term, he meant the following, which can be derived from his discussion of reason:

For reason existed – reason derived from the nature of the universe, impelling people to right actions and restraining them from wrong. That reason did not first become law when it was written down, but rather when it came into being. And it came into being at the same time as the divine mind. Therefore the authentic original law, whose function is to command and forbid, is the right reason of Jupiter, Lord of all. (Cicero, 1998, p. 125)

- <sup>183</sup> According to Professor McDonald, in 1772 Hamilton “was placed in Francis Barber’s Elizabethtown Academy to prepare for Princeton’s entrance requirements” (McDonald, 1979, p. 11). Princeton’s requirements for admission included: “besides the ‘common branches’ of English literature and composition, elocution, mathematics, and geography – ‘the ability to write Latin prose, translate Vergil [sic], Cicero, and the Greek gospels, and a commensurate knowledge of Latin and Greek grammar’” (McDonald, 1979, pp. 11-12).

- <sup>184</sup> One legal historian cited Edmund Randolph as an example of one of the primary authors of the Constitution who didn’t view the concept of sovereign immunity as a limitation upon the

federal judiciary's jurisdiction over lawsuits between states and either citizens of other states or citizens of foreign powers as provided under Article III, § 2 of the Constitution. After noting Randolph's presence on the Committee of Detail at the Constitutional Convention who drafted the Convention's sense of the Constitution after the lengthy and arduous debates of June and July, 1787, the legal scholar provided supporting detail for his argument:

Edmund Randolph, for example, had presented to the convention the first draft proposal on the powers of the national judiciary, which as generalized by the delegates, stated the objectives for which specific assignments were to be worked out in committee. (Jacobs, p. 25)

He continued:

Later, Randolph, as a delegate to the Virginia ratification convention, argued repeatedly against the immunity of the states from suits by individuals. And it was Randolph who appeared as counsel for the plaintiff in *Vanstophorst v. Maryland*, the first of the suits instituted against a state, and subsequently in *Chisholm v. Georgia*. (Jacobs, p. 25)

<sup>185</sup> Regarding ratification of the Articles of Confederation by the individual states, Professor McDonald observed:

To become effective, the document (and future amendments to it) had to be ratified by every state.... Virginia was first to ratify unconditionally; New York soon followed, and after seven months all but four states had ratified, with or without proposing amendments. The four holdouts were Georgia, Delaware, New Jersey, and Maryland. Soon the first three came through, and Maryland stood alone. (McDonald, 1965, p. 9)

Discussing the reluctance to ratify the proposed Articles, McDonald began by presenting an overview of the situation:

The reasons for opposition – as well as for support – were many, but at bottom lay a single reason and the fourth great enemy of the Republic. Behind the façade of slogans about the rights of Englishmen and the rights of man, different colonies had supported the revolution in pursuit of different goals, all local and few high-minded. If they failed to obtain these, they would view Union and even Independence as barren gains. (McDonald, 1965, pp. 9-10)

McDonald explained the opposition in socioeconomic terms:

The goal whose pursuit blocked ratification of the Articles was the ownership of the western lands. The question had meaning in many places, for several states were “landless,” having no claims or only

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nebulous claims to western areas, and most of these landless states had more population than their arable land, under existing technology, could support. (McDonald, 1965, p. 10)

McDonald continued explaining the historical context underlying Maryland's reluctance:

In Pennsylvania and Maryland the land supply had been limited by features of their charters, under which the proprietors, the Penns and Calverts, reserved large tracts for themselves. During the decade before Independence both colonies had sought a two-part solution: abrogation of the proprietary charters and releasing all lands west of the Alleghenies to buyers from all colonies. (McDonald, 1965, p. 10)

Specifically describing the socioeconomic grounding of Maryland's opposition to the Articles of Confederation, McDonald elucidated:

In Maryland it [the quest for more land] was a matter of economic necessity. Maryland's slave-labor plantation system was grossly inefficient, consuming great quantities of land; and its land disposal system – whereby planters left the eldest son the home plantation and gave the others money, slaves, and large acreage in the interior for establishing new plantations – required even more. By 1770 most of the land was taken up, and it was apparent that Maryland would soon either have to obtain some more land from somewhere or suffer the collapse of its entire socio-economic system. (McDonald, 1965, p. 10)

Virginia's actions in 1780 regarding its western land claims, brought about by the financial exhaustion of most states, the need for the confederation to establish public credit, and the "shift of the war to the South" began to pave the way for Maryland's ratification of the Articles of Confederation (McDonald, 1965, p. 15).

[I]n the fall of 1780 Virginia suddenly reversed its long-adamant stand and ceded all its lands north of the Ohio River to Congress. It imposed only one condition, that private claims to lands in the ceded territory be explicitly rejected. This action dissolved Maryland's public reason for refusing to ratify the Articles, though it left intact the private reason. (McDonald, 1965, pp. 15-16)

The private reason involved Virginia's rejection of claims by private land companies, which provided a much-needed source of public lands. McDonald explained:

The ablest spokesmen for Pennsylvania and Maryland were several private companies, the most important being the Illinois-Wabash and the Indiana, that had acquired claims to huge tracts in various ways, particularly by buying "titles" from Indians. Many of the prominent

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stockholders of these companies were also prominent nationalist leaders – including Robert Morris, Benjamin Franklin, William Duer, James Wilson, and Carroll of Carrollton. (McDonald, 1965, p. 11)

McDonald then drew the connection between the private companies' stockholders, American politics, and western land claims:

Because Congress would, until the Articles were ratified, operate extra-legally and thus have all such powers as it could get away with exercising, these nationalists were not eager for ratification anyway; and if they stalled, leaving Congress to cope with foreign powers without being a legal power itself, perhaps they could force the landed states to cede their claims. (McDonald, 1965, p. 11)

The final impetus behind Maryland's ratification of the Articles was provided by the intersection of the need for naval power and the French.

While Marylanders considered whether to ratify anyway and hope that Virginia's condition [regarding elimination of claims to western lands by private companies] could be obviated in Congress, the war gave them a nudge that settled the matter. In January, 1781, Maryland applied to the French minister for aid in defending Chesapeake Bay against the British navy, and the minister suggested that unless Maryland should ratify, it would be impossible for the French to act. The Maryland legislature promptly responded by authorizing its congressmen to subscribe to the Articles of Confederation. (McDonald, 1965, p. 16)

An English historian regarded the western land issue as one of the major accomplishments of the Articles of Confederation, a process begun prior to ratification of the Articles.

In the years since 1783 it [government under the Articles of Confederation] had achieved a settlement of the Western land question that was to be of incalculable importance to the American future. To get the Articles ratified it had been necessary to induce Virginia and other states with charter claims to relinquish them and concede that the vast stretch of territory between the Appalachians and the Mississippi, between the Great Lakes and the borders of Florida, should be held by Congress on behalf of all American citizens. The existence of this heritage did much to cement national loyalties and to diminish the importance of state identities. (Brogan, pp. 197-198)

<sup>186</sup> A legal expert provided more detail than that provided by the Court's record of the facts of the case. In addition to filling in the missing information, his account also provided information about another factor that may have influenced the Court's decision to directly

face the issue regarding the conflict between state laws and treaty provisions. According to Judge Gibbons description:

In 1793, ruling on a demurrer, Justice Iredell and District Judge Griffin outvoted Chief Justice Jay and held that payment of the debt by the defendant into the Virginia loan office in 1780 pursuant to the Virginia Sequestration Act of 1777 was a valid defense. By the time the appeal was argued before the Supreme Court in February 1796 Jay's Treaty had been signed and the joint commission established [to process outstanding debt claims by British merchants]. (Gibbons, p. 1940)

Also, by the time the appeal was heard by the Court, Chief Justice Jay had resigned the Court as of June 29, 1795 (Hall, 1992, p. 978). The treaty named for him had been ratified and he had been elected "governor of New York in absentia" (Hall, 1992, p. 447). Jay's motives were described by a legal scholar:

Jay finally concluded that the Court was an ineffective instrument of domestic unification and diplomacy. When Georgia responded to the Court's ruling against the state's claim of sovereign immunity in *Chisholm v. Georgia* (1793) with defiance and the introduction of the Eleventh Amendment in Congress, Jay abandoned the federal bench. (Hall, 1992, p. 447)

One might think Jay's abandonment of the bench meant his resignation from the Court; however, that would be a mistake as he didn't submit his actual resignation until later. As described in one account:

In 1794, while still sitting as chief justice, he sailed to England as *envoy extraordinaire* to defuse tensions with Britain over unpaid debts, sequestration of Loyalist estates, and New World trading rights. The Jay Treaty established mixed commissions to resolve economic disputes, granted trade concessions to Britain, and shifted responsibility for payment of defaulted loans to Congress. While resistance to the treaty was formidable, the Senate ratified it in 1795. (Hall, 1992, p. 447)

According to another source, however, "The commission ... never completed its work. The dispute over the unpaid debts dragged on until 1802, when it was settled by an agreement that the United States pay a lump sum of £ 600,000" (Gibbons, p. 1939, n. 270).

<sup>187</sup> Iredell's opinion defended the decision in which he participated as a member of the circuit court. One legal scholar observed of his opinion: "Iredell thus demonstrated his continuing sensitivity to the intensity of Southern feeling against the British over the issues of debt payment and compensation for emancipated slaves" (Gibbons, p. 1940, n. 276).